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No. 312—ON REARGUMENT

In the Supreme Court of the United States

OCTOBER TERM, 1935

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD CO., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF ON REARGUMENT ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

MARCH, 1936.

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OPINIONS BELOW

The opinion of the specially constituted District Court on the merits (R. 226) is reported in 9 F. Supp. 181; its opinion denying a stay pending appeal (R. 294) is unreported.

The reports of the Interstate Commerce Commission, of which the order involved is made a part (R. 10), appear as Docket No. 24069, *Atlantic Coast*

Line R. Co. et al. v. *Arcade & Attica R. R. Corp. et al.*, 194 I. C. C. 729–762; (R. 39) (July 3, 1933) and 198 I. C. C. 375; (January 8, 1934). (R. 79.)

JURISDICTION

The suit was commenced on May 25, 1934, under Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219; U. S. C. Title 28, Sec. 47), to set aside an order dated January 8, 1934, amending an earlier order of July 3, 1933, wherein the Commission prescribed just, reasonable and equitable divisions of joint rates on citrus fruits,[1] in carloads, from points in Florida to destinations in Official Territory,[2] and required retroactive adjustment of divisions of joint rates on shipments to Trunk-Line Territory[3] and to New England made during the period subsequent to November 22, 1930, the date of the filing of the complaint with the Commission, all pursuant to authority conferred upon it by Section 15 (6) of the Act.

---

[1] Oranges, grape-fruit, lemons, limes, pineapples, and other articles taking the same rates as oranges and grapefruit (R. 40).

[2] Official classification territory embraces, generally speaking, the territory east of the Mississippi River and north of the Ohio and Potomac Rivers, including New England, portions of Virginia and West Virginia, and certain destinations in Missouri, Iowa, and Wisconsin. (R. 227.)

[3] Trunk-line territory extends westward from the eastern boundary of New York to a line drawn through Buffalo and Salamanca, N. Y., Warren, Oil City, Pittsburgh and Washington, Pa., Wheeling, Parkersburg, Charleston and Gauley, W. Va. (R. 228.)

The final decree, denying the injunction, dismissing the petition, and upholding the validity of the Commission's order was entered December 31, 1934. (R. 269.) On March 6, 1935, the District Court rendered an opinion (R. 294) denying a stay pending appeal. Petition for appeal was filed February 26, 1935 (R. 272) and allowed the same day. (R. 278.)

On October 14, 1935, this court found that probable jurisdiction had been shown, and on January 14–15, 1936, the case was argued and submitted for decision. By its order of February 3, 1936, this court restored the case to the calendar for reargument.

QUESTIONS PRESENTED

1. Were the allegations of the petition and intervening petition, either in and of themselves or as sought to be buttressed by the evidence introduced *de novo* in the District Court, sufficient to raise the question of confiscation?

2. If the allegations of the petition and intervening petition are deemed sufficient to raise the issue of confiscation, does the evidence introduced before the District Court show such fact, contrary to the unanimous findings and conclusions of the three-judge court?

3. Can the appellants maintain a suit to annul an order of the Commission prescribing divisions by commingling allegations that the order results in

divisions which "are insufficient as to particular hauls, as to individual carriers, and as to Northern lines in the aggregate?" Can a group allegation of confiscation be urged?

4. In issuing the order of January 8, 1934 (R. 1626), which prescribes the basis for fixing divisions of joint rates on citrus fruit between points in Florida and destinations in official territory, and requires a retroactive adjustment of the divisions of joint rates applying on traffic between points in Florida to destinations in Trunk Line and New England territories, did the Commission misconstrue the provisions of Section 15 (6) of the Act, or accord undue weight to any element it is required to consider?

THE STATUTE

Pertinent provisions of the Interstate Commerce Act are:

> SEC. 1. (4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint

rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 15 (6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give

due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

STATEMENT

PROCEEDINGS BEFORE THE COMMISSION

On November 22, 1930, thirteen carriers [4] operating in southern territory filed a complaint with the Commission alleging that the divisions received by them out of the joint rates on citrus fruit, in carloads, from Florida origin points to destinations in trunk-line and New England territories were unjust, unreasonable, inequitable, unduly prejudicial, and otherwise in violation of the Act. The Commission was also asked to prescribe just, reasonable and equitable divisions for the future and to require retroactive adjustment of divisions from the date of the filing of the complaint. (R. 40).

[4] Listed in Note 2, First Report, 194 I. C. C. 729. (R. 40.)

The rates which are divided by the order under attack were prescribed by the Commission in *Railroad Commissioners of Florida* v. *Aberdeen & Rockfish Railroad Co.*, 144 I. C. C. 603 (decided July 10, 1928) referred to hereinafter as the *Florida Case.*

Also involved is that part of Docket 24160, *In the Matter of Divisions of Joint Interterritorial Rates between Official and Southern Territories,* as concerns divisions of rates on citrus fruit. (R. 41.)

On April 20, 1931, the northern lines, defendants, filed a cross-complaint making the same allegations concerning the divisions they received out of the Florida citrus-fruit rates, and praying for the establishment of just, reasonable and equitable divisions retroactive to the date of the filing of the cross-complaint. (R. 40.)

Petitions of intervention in support of the relief sought by the southern carriers were filed by interested shippers and shipping organizations. (R. 41.)

Numerous hearings were held running intermittently from May 11, 1931 to December 22, 1931, and the evidence developed at these hearings, in narrative form, covers 903 pages of the transcript, (R. 309–1211) and in addition 358 exhibits, some of them quite voluminous, were received. (R. 298.) No claim is made that a full hearing was denied. (*New England Divisions Case,* 261 U. S. 184, 200.)

Briefs were filed by the respective carriers, and in accordance with established practice, Commis-

sion examiners served a proposed report to which appellants filed exceptions. Oral argument was made before the Commission on December 8, 1932, and its decision, holding that the existing divisions were unjust and unreasonable, and prescribing a just and reasonable basis, was rendered on July 3, 1933. (R. 39.) Upon appellants' request, the Commission reopened the case and on January 8, 1934, issued a report on reconsideration, 198 I. C. C. 375, (R. 79) in which it said:

> * * * Upon petition of carriers parties to these proceedings classed as official-territory lines * * * we have reopened the proceedings for further consideration on the record as made prior to the date of submission of the original report, supplemented by certain data from statistical reports in our files, which under stipulations of counsel may be considered as evidence.
>
> The record as to citrus divisions is large, and the issues as to such divisions were carefully briefed and argued before our former decision. The only additional facts which defendants refer to as warranting consideration are shown in the statistical data above mentioned, and for that reason it has been deemed unnecessary to assign these cases for further oral hearing or argument. In accordance with procedure occasionally followed in certain other cases of somewhat similar character and scope we shall in this report comment briefly upon some of the

principal assignments of error in defendants' petition. (R. 79–80.)

The order under attack issued the same day. (R. 10.) The northern lines filed a second petition for rehearing in April, 1934, (R. 1580) raising for the first time the issue of confiscation, (R. 16) the southern lines replied, (R. 132) and the Commission, after extending the order's effective date to permit study of the second petition, (R. 1628) denied it on May 14, 1934, (R. 1629) whereupon this suit was instituted. By the terms of the order, as amended, the new basis of divisions for the future became effective on June 1, 1934. (R. 1628.) The Commission postponed the time within which retroactive adjustment of the divisions should be made until March 11, 1935, (R. 1633) on which date the carriers filed with the Commission a statement showing, with modifications subsequently to be reconciled, the amounts due to, and owing from, the various carriers under the Commission's findings. But no money has in fact been paid from one group to the other; in other words, the Commission has not issued an "order for the payment of money." And the lower court specifically found that the order should not be so construed. (R. 262.)

Earlier Proceedings before the Commission: The rates on citrus fruit from Florida to destinations throughout the United States have been a source of much litigation before the Commission. The chaotic condition of these rates and the early cases

dealing with them are reviewed in the *Florida case, supra.* That decision fixed new bases of rates, effective November 9, 1928, and the important changes it made, in many features of the former citrus rates, are described in the Commission's first report herein. (R. 42.) The Commission said that the decision in the *Florida case*

> resulted in both increases and reductions in individual rates, but the net result based on traffic which moved during the 1928–29 test period was an average reduction of 67 cents per ton. To New England, there was a small net increase. (R. 43.)

The rates on citrus fruit prescribed by the Commission in the *Florida case* were the same as the sixth-class rates (40 percent of first class), with one exception which need not be explained here. The class rates which were thus used as the basis of the commodity rates on citrus fruit had been prescribed several years previously in a comprehensive proceeding known as *Southern Class Rate Investigation,* 100 I. C. C. 513, 109 I. C. C. 300, 113 I. C. C. 200, 128 I. C. C. 567. In that proceeding the Commission established a uniform basis of class rates within the South and between the South and the North, representing both increases and reductions in the widely different rates which had formerly applied. The uniform basis would have produced substantial reductions in the prior rates to and from points in the interior of Florida, commonly referred to as the Florida peninsula. In order to

alleviate the severity of the reductions on the Florida railroads and also in recognition of the low density of traffic in Florida the Commission authorized a somewhat higher basis of rates for the Florida peninsula than for other sections of the South. The device employed in providing this higher basis consisted of a scale of so-called arbitraries based on the distance represented by the movement within the Florida peninsula to be added to the uniform basis. These arbitraries are commonly known as the Florida arbitraries. They were not determined by definite evidence of service costs within Florida, but were authorized by the Commission because it was of the view that, everything considered, the rates to and from the Florida peninsula might properly be somewhat higher than those in other parts of Southern territory. Since the arbitraries were provided for the benefit of the Florida lines it was contemplated that they should accrue exclusively to the Florida railroads. Aside from this, however, the existence of the Florida arbitraries is of no particular significance in connection with divisions. It may be pointed out that these arbitraries were not intended as full compensation to the Florida lines for the adverse conditions affecting them, as it was recognized that the Florida rates could not be susbtantially higher than those in other parts of the South. The situation of Florida was therefore not unlike that of New England which this Court commented upon in the

New England Divisions Case, 261 U. S. 184, 192, as follows:

> To have raised the additional revenues needed by the New England lines wholly by raising the rates within New England—particularly when rates west of the Hudson were raised much less—might have killed New England traffic.

History of the Divisions: The first report reviews the history of these divisions from 1890, (R. 43) and shows that "for a number of years" the rates between the South and New England and trunk-line territory were "arrived at by adding to the amounts fixed by the southern carriers for their service south of the gateways, such as Richmond, Va., certain divisions, known as 'specifics', because they were stated in specific amounts, established by the northern lines. The specifics for citrus fruit were stated in amounts per box." (R. 43.) The report continues: "From 1892 until 1908 these specifics remained substantially unchanged, except for an increase to Boston, although some changes were made in the gathering charges of the Florida lines south of Jacksonville in this period and also in the rates from the latter point to the gateways." (R. 43.)

Following the 1928 reductions made by the decision in the *Florida case,* the southern carriers proposed to the northern lines that each group shrink their revenues proportionately to the aggregate reduction. (R. 45.) This method of dividing a rate

which has been reduced is known as a revenue prorate. (R. 1490.) Northern lines declined this proposal insisting upon and enforcing a division in cents per 100 pounds, equivalent to the former specifics, which, as will be explained subsequently, yielded them more revenue from the new reduced rates than they derived from the higher rates previously in effect. In this manner the southern lines were compelled to bear the entire burden of the rate reductions and a considerable sum in addition. As the Commission said: "Complainants refused to agree to defendants' demands, but have been under the practical necessity of settling accounts for the time being on the basis offered by defendants, because freight charges on citrus-fruit traffic are ordinarily collected at destinations, and defendants are thus in a position to withhold the revenue to which they consider themselves entitled."[5] (R. 45.)

The report contains an estimate of the revenues accruing to the northern lines because of their "strategic position as collectors of the freight." It is said:

> According to a test covering the period from November 9, 1928, to June 30, 1929, hereafter designated the 1928–29 test period, defendants retained in this manner an average

[5] This Court has referred under similar circumstances to "their strategic position as collectors of the freight" of carriers occupying a somewhat similar situation to that of the northern lines. (*Alton R. Co.* v. *United States*, 287 U. S. 229, 236.)

> of 78 cents per ton more than they would have received under the former rates and divisions on traffic to New England trunk-line territory. Since these rates were reduced 35 cents per ton on the average, as before indicated, the net average reduction in complainants' gross earnings on this traffic thereby became $1.13 per ton. Complainants estimate that in the three shipping seasons between 1928 and 1931 defendants thus received an increase of $1,215,510 over the amount which they would have received on an equivalent movement under the former rates, whereas complainants' revenues on the same traffic have been reduced to the extent of $1,761,420. The effect of the arrangement which has governed the division of revenue from traffic to central territory has been to reduce the revenues of the complainants only in the amount of the reductions in the rates, and an additional negligible amount presumably due to adjustment of fractions. * * * (R. 46.)

The difference in the situations as to the divisions on shipments to New England and Trunk-Line Territories and to central territory is due to the fact that the New England and trunk-line carriers "took the position that, since the former specifics must be assumed to have covered the transportation of 80 pounds only, they should be increased 25 percent in order to afford commensurate compensation for the carriage of 100 pounds. The carriers in central territory, however, demanded an increase of only 11

percent in their former specifics, thus tacitly conceding that those specifics applied on 90-pound boxes." (R. 45.)

Characteristics of Citrus Traffic.—For the years 1929, 1930 and 1931, Florida citrus shipments averaged 921,997 tons annually, 85 percent of which went to official territory. It is, as found by the Commission, "concentrated" traffic in that it moves from a fairly compact producing area mainly to the most populous cities in the North, New York, Philadelphia, Boston and Chicago, principally. (R. 53–54.) The report shows that in 1928–1929 the Pennsylvania Railroad received 24,123 carloads of citrus fruit at Potomac Yard, Va., and delivered 18,430 of these to final destinations on its own rails; in the same period the Baltimore & Ohio received 4,502 cars, of which it made final delivery of 3,128 cars. (R. 55.)

The report shows that the service of the southern lines in transporting citrus fruit is much more costly than that of the general run of traffic, due to the necessity of the carriers providing daily service from all origin points over a wide territory (R. 55); discloses that wide fluctuations in the traffic, caused by weather and market conditions, impose upon the carriers a greaf burden in supplying cars to handle shipments, necessitating sometimes the running of special trains long distances to place empty cars and move them after loading (R. 55); shows that as 99 percent of the traffic moves in refrigerator

cars, empty refrigerators must be brought in from the North, many times in special trains (R. 55); and shows also that operating costs due to additional train and switching service have increased to permit of icing in transit. (R. 56.) Because of fluctuations in supply and demand at consuming points, the diversion or reconsignment in transit of cars loaded with citrus fruit is an important trade practice and a source of expense to the carriers. The practice of reconsigning cars, after the transportation has begun, is a service that the shippers demand, so much so that almost 50 percent of all cars shipped are now diverted more than once on the average. (R. 56.) This widespread practice prevents the carriers from making up solid trains at or near concentration points and running them through to the principal junction points. (R. 56.) The Seaboard Air Line showed an average cost of $4.24 for each diversion. (R. 56.)

In 1930–1931, at the insistence of shippers, expedited service was had on this traffic resulting in a 24-hours saving in time, adding to the cost of service, "chiefly because the increased speed necessitated reduction of tonnage ratings, additional yard service at terminals, greater expenditures for maintenance, greater claim hazards, and more expensive assembly service at points of origin." (R. 57.) The southern lines absorbed 85 percent of the time reduction and the Atlantic Coast Line found it necessary to increase the maximum speed of its

perishable trains from 35 to 45 miles per hour. (R. 57.)

Defendants' operating evidence dealt with the service performed by them at and north of Potomac Yard. The expense incurred in classifying cars, giving of expedited service, operating conditions on the line of the Pennsylvania from Potomac Yard to New York, were discussed in the report (R. 57), together with a review of the evidence of the same character by the New Haven, the Baltimore & Ohio and the Reading Railroads, covering traffic to destinations on their lines. (R. 58.) In the report, it is said:

> During the height of the shipping season from November to May, it appears from a chart based on the 1928–29 season that the Pennsylvania seldom received less than 50 cars of citrus fruit per day at Potomac Yard and frequently as many as 200 cars. During the height of the citrus season the Pennsylvania operates solid trains of perishables from Potomac Yard to New York. To other destinations in the interior of New England trunk-line territory there is insufficient traffic for solid trainloads.

The detailed evidence describing operating conditions on shipments to central territory is summarized. (R. 60.) And there was much general evidence by both sides covering, among other matters, population of the southern states as compared with States in official territory (R. 63); traffic

density figures in both territories (R. 63); the addition of arbitraries for the Florida peninsula in recognition of its light density was referred to (R. 63), and the statement made that:

> * * * The traffic density of the Pennsylvania, which is the principal carrier of citrus fruit in official territory, is 549 per cent of that of the Atlantic Coast Line, which is the leading southern carrier of this commodity. * * * (R. 63).

To show comparative cost of operation, including return on investment in the two territories, the northern lines relied on a statistical study based on the 10-year period 1921–1930. (R. 66.) Concerning this study, the Commission said:

> * * * We regard the study as chiefly significant for its showing of the relative profit derived from passenger and freight traffic in the two territories, tending to confirm the general impression that passenger traffic is less profitable in the South than in official territory, although it has declined greatly in both territories. (R. 67.)

Section 15 (6) Elements.—The divisions section of the statute, 15 (6), requires the Commission in prescribing and determining the divisions of joint rates to give—

> due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway

> property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

There is a discussion in the report of the evidence dealing with these statutory requirements (R. 68–70), in the course of which the Commission said:

> * * * "It may fairly be said that there is no lack of efficiency on the part of either the southern or the eastern lines, so far as this record shows." (R. 68.)

In its discussion of the evidence concerning the revenue requirements of the two groups, the Commission said:

> * * * It will be observed that the rate of return of the southern lines was appreciably below that of the eastern roads. * * * (R. 69).

The conclusion was reached that the financial condition of the southern roads was less favorable than that of the northern roads. (R. 70.)

The northern lines had suggested that the divisions on citrus fruits should not be established in advance of the decision in no. 24160, relating to

divisions of all interterritorial class and commodity rates between official and southern territories. (R. 70.) The Commission showed how this citrus traffic differed from the general run of class-rate traffic (R. 71), and denied the requested postponement. (R. 71.)

It was shown by the report that in 1908, the citrus-carrying roads agreed on divisions which remained in effect for 18 to 20 years (R. 72), concerning which it was said:

> * * * Although the divisional bases so agreed upon were marked by some inconsistencies, as before pointed out, it may be assumed that they produced fair results on the whole inasmuch as they remained in effect for 18 and 20 years until their abrogation was precipitated by revision of the rates. (R. 72.)

Transportation Costs in the Respective Territories.—The first opinion of the Commission states:

> * * * The statistical evidence before us supports the view we have expressed in other proceedings that transportation costs are generally higher in the southern than in the eastern group, * * *. (R. 72),

and also—

> that the southern lines require a greater margin of profit per traffic unit than those in the eastern group according to an exhibit introduced by defendants. * * * (R. 73.)

The Commission showed why the use of refrigerator cars and the extensive reconsignment of ship-

ments imposed heavier burdens on the southern lines, (R. 73).

Importance of the Citrus Traffic to the Respective Groups of Carriers.—Concerning this important element, the report reads:

> In 1928–31, of the gross freight revenue of the eastern carriers 74 percent was derived from products of mines, manufactures and miscellaneous carload freight, which categories are commonly considered to include commodities affording the best financial return, whereas the southern roads' percentage from these classes was 52. On the other hand, in the southern region, products of agriculture and forests, which are less desirable from a revenue standpoint, accounted for 31 percent of the total compared with 12 percent for the eastern group. Citrus-fruit traffic produced 2.6 percent of the total freight revenue in the southern region in that period, being exceeded in importance only by bituminous coal, lumber, and petroleum products. In the eastern group only 0.36 percent of the gross freight revenue came from citrus fruit. This commodity was by far the most lucrative traffic which the Atlantic Coast Line had in this period, producing 13.6 percent of its total freight revenue. The percentages for the Seaboard Air Line and the Florida East Coast are 9 and 7.5 respectively, and are exceeded only by the percentages for petroleum products. (R. 74.)

Pertinency of Earlier Divisional Agreements.—The Commission found that the divisional agreement in force from 1908–1910 until November 9, 1928, was pertinent. (R. 75.)

In conclusion the Commission said that the reductions prescribed by it in the *Florida case, supra,* were made in the light of the improved conditions then prevailing on lines serving Southern territory, but that since then

> a recession set in which has been more declivitous in the South, resulting in a decrease of 38 percent in 1931 and 1926, compared with 31 percent for the eastern group. The Florida lines have been much more seriously affected, their average decrease being 45 percent. * * * (R. 75.)

The trend of the citrus fruit traffic, however, was the other way (R. 75); in 1931 a new high was set on cars originated in the South. The view was then expressed:

> * * * On consideration of the elements pointed out in the report in the *Florida case,* before referred to, on which the rates there prescribed were based, we are of the view that the revenue reductions caused by those rates should be absorbed by the southern lines, and that some weight should be given to the fact that those lines in 1920 received increases in revenue from this traffic which exceeded in percentage the rate increases within the South. We find nothing in the record supporting the view that the eastern

> lines are entitled to such a large share of the revenue as that accruing from the amounts they have withheld since November 9, 1928. The worse financial condition of the southern lines negatives such a view. (R. 76.)

Findings.[6]—The Commission's ultimate findings were set out, and a plan for determining the divisions to be applied, was prescribed. (R. 76–77.)

Report of the Commission on Reconsideration, January 8, 1934: The Commission reopened the case, upon petition of the northern lines to consider further the evidence already introduced; also to consider supplemental data from statistical reports in its files which, under stipulation of counsel, were to be considered as evidence. (R. 80; R. 1549.) In the second report (R. 79) it discussed fully various contentions made by the northern lines and showed how fallacious they were. The procedure followed is similar to action taken by the Commission in other cases, including *In the Matter of Divisions of Freight Rates in Western and Mountain Pacific Territories,* 148 I. C. C. 457, 156 I. C. C. 94, the order in which was sustained in *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74.

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[6] Appellants do not question the adequacy of the Commission's findings, but we direct attention to the fact that in their requested findings of fact and conclusions of law, submitted to the District Court, appellees have set out in some detail what may be described as underlying findings in the two reports, and which form the basis of the ultimate findings. (R. 160–173.)

The Commission in its supplemental report took up individually and commented upon the more important points made by the northern lines, and the court is referred to the report of January 8, 1934, and also to the original report, to show how painstaking the Commission has been. In the report on reconsideration (R. 79) the Commission said:

> The plan of our prescribed divisions departs broadly from that of the former divisions. So far as we are able to estimate from data of record, it would afford the northern lines more revenue than they would receive under the former basis of rates and divisions, and this is not denied in their petition. (R. 87). In this connection it is also of interest to compare some of the percentages of the rates which would accrue to the northern lines under our findings with those under the basis in effect prior to November 9, 1928, as shown in the following statement:

From Orlando, Fla., to—	Percentage of total rate	
	Former	Prescribed
Baltimore, Md	16	17.8
Philadelphia, Pa	17	18.8
New York, N. Y	20	21.6
Boston, Mass	27	29.3
Pittsburgh, Pa	29	24.5
Chicago, Ill	18	18.9
Cleveland, Ohio	18	16
Detroit, Mich	18	17

(R. 87–88.)

The Commission made a minor modification in its first report, (R. 94) and then affirmed its prior decision. (R. 94.)

On the same day, January 8, 1934, the Commission issued its amended order, attacked in this suit. (R. 10.)

Second Petition for Reconsideration.—On April 30, 1934, the northern lines again requested the Commission to reconsider its decision, alleging for the first time that, based upon a cost study attached to the petition, the prescribed divisions were confiscatory.

In the Commission hearings appellants expressed no view as to how the citrus fruit rates should be divided, but urged that the question should be decided only after completion of the record in the pending general investigation of divisions of substantially all interterritorial rates between the South, (R. 51) and that in the interim the Commission should make the purely negative finding that the existing divisions were not unjust, unreasonable or inequitable to the southern lines. (R. 52.) Nor in their first petition for reconsideration, which the Commission granted, did appellants take the position that there were ascertainable costs of handling citrus traffic which showed the Commission's findings to be confiscatory of their revenues. This point was raised for the first time in their second petition for reconsideration, denied by the Commission on May 14, 1934. (R.

95.) In the meantime, the Commission postponed the order's effective date thirty days for consideration of the petition, together with the grounds of the alleged confiscation as therein set forth, as well as the written reply of the southern roads. (R. 1628.) In accordance with its usual practice the Commission merely entered an order denying the petition without stating its reasons. Consequently there is no discussion of this particular point in the Commission's two reports dealing with the citrus divisions, but such discussion was unnecessary in view of numerous decisions of the Commission as well as of the courts pointing out the infirmities of cost studies constructed along the lines which appellants followed. These decisions will be referred to subsequently. All of the evidence which the petitioners prayed leave to offer and to have the Commission consider, in support of the alleged confiscation, was elaborately set forth in the petition for rehearing itself and was in the form of an affidavit which was made a part of said petition. (R. 14; R. 1610.) The formula (average car-mile expense unit) used by petitioners in computing the alleged cost of handling the citrus fruit traffic is the same formula used in this suit. The figures set out in the petition for rehearing, obtained by the use of such formula, are the same figures which appear in the original petition in the lower court. (R. 17–18; R. 1619.) The only effect of the amendment of the original petition in this

respect, was to change the original figures somewhat by the inclusion of a greater number of cars. (R. 146; Hodkinson Exhibits Nos. 4 and 4–A.)

When the Commission denied the second petition, it already had before it and had considered the proffered evidence in support of the claim of confiscation that appellants desired it to consider, as well as the entire record of the previous hearings, much of the testimony in which consisted of cost calculations and other statistical data offered by the appellants.

The Commission, moreover, was able to see from the petition for rehearing—in fact that petition expressly so alleged—that the cost formula which was set out and used in said petition, and the underlying basis of which was the use of "system average" costs in computing the cost of carrying citrus fruit, was substantially the same formula that had been used and relied upon very recently in another case before the Commission (R. 1587), where the formula had definitely been rejected by the Commission as being based upon a fundamentally erroneous theory, and its action had been upheld by a three-judge Federal court in a suit to enjoin the order (*Railway Express Agency* v. *United States*, 6 F. Supp. 249, hereinafter more fully referred to).

PROCEEDINGS IN THE LOWER COURT

Following the Commission's denial of the second petition for rehearing on May 14, 1934, this suit was brought by the Baltimore & Ohio, Pennsyl-

vania, and Richmond, Fredericksburg & Potomac Railroad Companies. A petition for intervention was filed and allowed as parties complainant on behalf of thirteen [7] other railroads which participate in the haul of citrus fruit north of the dividing gateways either to Central Freight Association territory, or in the haul north of the dividing gateways to trunk line or New England territories. (R. 105.) The Interstate Commerce Commission and the southern lines intervened as defendants.

The points made in the petition are: (a) the prescribed divisions are confiscatory in violation of the Fifth Amendment, and in violation of Section 15 (6) of the Act; (b) the orders of the Commission subordinated all other findings and facts to the single element of financial need; (c) the orders of the Commission are in excess of its statutory powers and unlawful because it erroneously based its conclusion as to the financial needs of Southern lines incident to the transportation of citrus fruit on the average rates of return on all their property from the total freight and passenger business of the Southern lines, and (d) the said orders, so far as they have retroactive application, if inter-

[7] Boston & Maine Railroad, New York Central Railroad, Pittsburgh & Lake Erie Railroad, New York, New Haven & Hartford Railroad, Central Railroad Company of New Jersey, Reading Company, Lehigh Valley Railroad, Delaware, Lackawanna & Western Railroad, Delaware & Hudson Railroad Corporation, Pere Marquette Railroad, Erie Railroad, Chesapeake & Ohio Railway and Chicago & Eastern Illinois Railroad. (R. 1.)

preted as orders for the payment of money, are void as in derogation of the right to trial by jury guaranteed by the Seventh Amendment.

The petition set forth the alleged aggregate costs and expenses of the three petitioners, incurred in transporting a part of the citrus fruit handled by them during the 1928–29 shipping season, the expenses for certain hauls, and further set forth their alleged combined revenues from the divisions in the aggregate and for certain hauls; therein it was also alleged that the prescribed divisions were not sufficient for particular and typical hauls, or, in the aggregate, to pay petitioners' costs and expenses (with no allowance for return on investment) reasonably chargeable to their transportation and handling of citrus fruit, and that, therefore, said divisions were confiscatory. (R. 15–18.) The petition failed to allege any facts concerning the total costs and expenses of any individual petitioner or the total combined costs and expenses of the three petitioners, and failed to allege, either in the aggregate or separately, the value of the property of the petitioners used in transporting citrus fruit, nor did it allege any joint interest in or right to the properties of the three petitioners.

The intervening petition alleged confiscation "in the aggregate" (R. 107) but failed to allege confiscation with respect to any individual intervener, that is to say, neither the operating cost nor the value of the property of any individual intervener

was alleged, nor was there alleged any joint interest in the aggregate or combined railroad properties used in transporting citrus fruit.

The answer of the United States and of the intervening railroads incorporated as their first defense a motion to dismiss the petition on the grounds that—

> (1) The petition failed to allege or set forth facts showing the costs and expenses incurred by the three petitioners individually in transporting citrus fruit and failed to allege either the aggregate value or the separate values of the individual properties used by the respective petitioners in transporting citrus fruit; and
>
> (2) There is no foundation in law for the claim of confiscation "in the aggregate" in that the petition failed to show that petitioners had any joint interest in or right to the separate property of the individual petitioners.
>
> (R. 112; R. 144.)

As their second defense the above-named defendants and the Commission answered the several allegations of the petition admitting that the Commission issued the order but denying that it was in any respect unlawful. (R. 98; 114; 120.)

Amendments to the petition were thereafter filed by the three original petitioners setting forth their alleged individual costs and expenses incurred in transporting a portion, but not all, of the shipments of citrus fruit handled by them in the 1928–

29 season, together with their alleged revenues on such shipments (R. 146–148); but the values of their respective properties used in transporting such shipments were not alleged, either in the aggregate or individually, nor was there alleged any joint interest in or right to the properties of the individual petitioners. The intervening petitioners filed an amendment at the hearing in the District Court which set forth the alleged aggregate or combined amounts of revenue received by all of the thirteen intervening petitioners from the prescribed divisions, and the alleged combined or aggregate costs and expenses incurred by them in handling a stated number of cars of citrus fruit, and alleged further that the individual operating costs and the revenues of each intervening petitioner would be shown in an exhibit to be introduced in evidence, which exhibit was by reference undertaken to be made a part of the amendment (R. 153), but the intervening petitioners have not alleged their individual operating costs or their individual revenues or the value of their properties, either in the aggregate or individually, nor have they alleged any joint right to or interest in said combined properties.

The case came on for final hearing before the three-judge court at Baltimore, and during the week of September 17, 1934, six full days were devoted by the court to the introduction and receipt of evidence *de novo* in support of the allegation of

confiscation. This evidence, in narrative form, covers 336 pages of the printed record. (R. 1212–1548.) A comparison of this record with that before the Commission, which in itself covers 903 printed pages (R. 309–1211), will show that much of the evidence presented to the court had already been presented to the Commission. On September 27, 1934, the case was argued and submitted on final hearing, and on December 31, 1934, a decree dismissing the bill was entered. (R. 269.) On March 6, 1935, an application for a stay pending appeal was denied, with opinion. (R. 294.)

Appellants on brief stress the fact, as stated by them, "that of the eleven commissioners who at one time or another have considered the Commission's report six have either voted against it or to reopen the case for further hearing." This circumstance is without significance. The Commission's complete membership of eleven at no time participated in the votes in this case. These votes covered a period of about 10 months, in which there were changes in the personnel of the Commission. Commissioner Brainerd, who dissented at the time of the first report, thereafter left the Commission on the expiration of his term. Commissioner Miller, who had been appointed after this case had been submitted for decision, did not participate in the two reports, but voted to grant appellants' second petition for further consideration. Commissioner Aitchison, who voted with the majority in

favor of the two reports, likewise voted to grant the second petition for further consideration. In the event that the case had been reopened for the second time it is of course inferable that Commissioners Aitchison and Miller might have favored adhering to the original conclusions after further consideration. Speculation on that score is idle, however, for the reason that the Commission is under no legal obligation to arrive at unanimous conclusions, since the principle of majority rule governs its deliberations, as it does those of courts. It is significant, however, that the dissenting commissioners in their separate expressions indicated a difference with the majority only on the question of administrative judgment which was presented and suggested no taint of illegality in the conclusions reached by the majority. (Cf. *Int. Comm. Comm.* v. *Del., L. & W. R. R.*, 220 U. S. 235, 251–252.) It is further of great significance that the three able and experienced judges composing the lower court, who spent six days in listening with meticulous attention and comprehension to the evidence presented to them *de novo*, were completely unanimous in upholding the Commission's findings as being in conformity with the law.

SUMMARY OF THE ARGUMENT

I. The petitions and intervening petitions were not sufficient to allege confiscation with the certainty and precision required by decisions of this

Court. *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151; *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298; *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440. "In an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted with respect to a subject so intricate and important should not be accepted as adequate proof to sustain a finding of confiscation."

In appellants' amended petition, it is alleged that, using statistics for 1929, and allocating expenses to citrus fruit traffic on a system freight car mile basis, their costs and expenses exceed for particular and typical hauls, and closely approach for others, the total gross revenue in the aggregate and per car that appellants would receive from the prescribed divisions. (R. 146.)

The "particular and typical hauls" referred to and used throughout the study are 17,324 cars of citrus fruit which originated, during the 1928–29 shipping season, at points in Florida on the Atlantic Coast Line and Seaboard Air Line, and were delivered by the Pennsylvania or the Baltimore and Ohio "at Altoona, Pa.; Baltimore, Md.; Buffalo, N. Y.; New York, N. Y.; Philadelphia, Pa.; and Pittsburgh, Pa., and other destinations, and constituted 71 percent of all cars of Florida citrus fruit delivered during the shipping season of 1928–29 by the Pennsylvania and the Baltimore & Ohio at destinations in trunk-line territory." (R. 147.)

During the 1928–29 shipping season there were, over and above the 17,324 cars mentioned, 11,301 cars in the movement of which the Pennsylvania or the Baltimore & Ohio participated, and under rates the divisions of which were covered by the Commission's order. (R. 1330.)

The intervening petitioners were thirteen railroads participating in the transportation of citrus fruit via the Virginia gateways to destinations in eastern trunk-line and New England territories, or destinations in central territory, west of the Buffalo-Pittsburgh line. (R. 1.)

Excepting the allegations in the amended petition covering the 17,324 cars, neither the original nor the intervening petitions set forth the subdivision of the revenue between the various participating roads operating north of the dividing gateways; or the costs and expenses alleged to be incurred by each petitioning road individually (other than the general averment in the original petition that the costs of the petitioners, Pennsylvania, Baltimore & Ohio and R. F. & P., on other shipments "are relatively greater" than on shipments to the destinations named in the petition) (R. 16); or to what extent or in what way each individual petitioner may have participated in the transportation of the traffic. Furthermore, in neither petition (and here the 17,324 cars are included) is there any averment that, in the subdivision as between themselves of the revenue accruing north of the

dividing gateways, the amounts received by the several individual petitioners are reasonable. (R. 1331.)

These fundamental defects were not obviated by amendment to the original petition which set up, with respect to the 17,324 cars delivered either by the Pennsylvania or the Baltimore & Ohio, an apportionment of revenue between the R. F. & P., on the one hand, and the Pennsylvania or the B. & O. on the other, and which also set up the amount of the alleged deficit to the three railroads in the aggregate and an assignment of a deficit of $65,578.90 to the Pennsylvania, and a deficit of $1,259.56 to the R. F. & P.; while as to the B. & O., it is averred that there would be "a very narrow margin" over estimated costs and expenses, and a "nominal return" upon the value of the property used in the service of transporting citrus fruit. (R. 146–147.) The basis of this apportionment appears to be on basis of percentages varying in amounts dependent upon the final destination of the traffic. Nowhere is it either alleged or shown that this apportionment is a reasonable one, or that the R. F. & P. may not, in some instances, receive too much and the Pennsylvania too little, while in other instances the reverse of this may be true. (R. 1331–1332.)

No cost data at all was submitted with respect to the Boston & Maine, New York Central, Pittsburgh & Lake Erie, New York, New Haven & Hartford, Central Railroad Company of New Jersey, Read-

ing Company, Lehigh Valley, Delaware, Lackawanna & Western, Delaware & Hudson and Pere Marquette, interveners in the lower court and appellants here, although all of these roads participate via various routes in the citrus fruit movement and in the prescribed divisions north of the dividing gateways. (R. 253, 1337.)

II. The District Court, upon a trial *de novo,* correctly held that the evidence was insufficient to prove confiscation. The evidence relied upon was an average car-mile expense figure which, it is submitted, does not furnish a reasonable basis for approximating the cost of handling citrus fruit. The formula for this method of approximating cost had shortly before been presented to and rejected by the Commission in another proceeding, and its action had been upheld by a three-judge court. *Railway Express Co.* v. *United States,* 6 F. Supp. 249. The Commission has consistently rejected average costs for all traffic as proof of the cost of handling a single commodity. *Iron Ore Rate Cases,* 41 I. C. C. 181; *Republic Iron & Steel Co.* v. *B. & O. R. R. Co.,* 83 I. C. C. 429; *Brier Hill Steel Co.* v. *B. & O. R. R. Co.,* 83 I. C. C. 709, and cases cited, *post* p. 106. Such a formula is deficient, among other reasons, beause it makes no distinction between line-haul costs and terminal overhead costs; because it assumes that there are no inherent differences in the transportation characteristics between citrus traffic and the average traffic, which would

make for a difference in car-mile costs, and because it assumes that the cost of hauling a loaded car one mile is the same as hauling an empty car the same distance thus giving no consideration to relative weight. A somewhat similar "composite figure" theory purporting to show cost was held fallacious in *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S. 39. And see *Minnesota Rate Cases,* 230 U. S. 352, 467–469; *Missouri Rate Cases* 230 U. S. 474, 507.

There is nothing in the Commission's decision in the *Florida Log Case,* 186 I. C. C. 157, inconsistent with its action here, nor does that decision support in any respect the use of the average car-mile cost theory. Among other distinguishing features, the study in the *Florida Log Case* did not involve the fault of pyramiding the terminal element, whereas appellants' study does have that defect.

III. The Commission did not act arbitrarily in any respect in issuing the order. It did not give undue weight to the financial needs of the southern carriers. This Court has stated it to be the Commission's duty to consider the financial condition of the carriers, which the Commission did, and which the statute required. *Beaumont Case,* 282 U. S. 74. But it did not make the financial needs of the carriers the only test. Nor did the Commission misapply the provisions of Section 15 (6) in giving consideration to the average rate of return from the total business of the Southern lines in ar-

riving at the basis of divisions prescribed in this case. Appellants admit, in making this contention, that "they seem to be running counter to explicit expressions by this court on the point." (Original Brief, p. 150.)

The two reports of the Commission show that it carefully considered and gave effect to evidence concerning all elements which Section 15 (6) required it to consider.

In 1908, the citrus-carrying roads agreed on divisions which remained in effect for 18 or 20 years (R. 72) concerning which the Commission said "it may be assumed that they produced fair results on the whole." The divisions prescribed by the Commission, here attacked as confiscatory, actually produce greater revenues for appellants than they obtained under the old basis, which had been in effect for many years. (R. 87.) Such increase amounted to an average of $2.15 per car. (R. 1491.)

Prior to November 9, 1928, the appellants received for the movement of Florida citrus from Richmond to New York about $67 per car under a basis of divisions which had been in effect for about 18 years, except as affected by changes in the general rate level, whereas they now contend that $83.69 measures the actual transportation costs plus taxes. Furthermore, the division which appellants put into effect on their own initiative fell short of meeting their estimated costs by more than $8 per

car, that division being slightly less than the amount resulting from the Commission's findings.

It is also pertinent to refer to the divisions received by appellants from rates on citrus fruit from California to eastern points. At the time of the hearing in May, 1931, it appeared that the Pennsylvania Railroad participated in the movement from California, receiving divisions yielding it $92.09 per car for its haul from Chicago to Buffalo, 673 miles, and the same for a movement to Pittsburgh, 468 miles. Appellants now assert that the transportation costs and taxes for a carload of Florida citrus from Richmond to Buffalo, 550 miles, are $135.48 and from Richmond to Pittsburgh, 416 miles, are $101.45. (R. 1622 J.) In other words, the Pennsylvania argues that merely to cover operating expenses and taxes for the haul from Richmond to Pittsburgh it must have $9.36 per car more than it receives for a haul 52 miles longer from Chicago to the same point. Likewise for the haul from Richmond to Buffalo it claims $43.39 per car more than it gets for a haul 123 miles greater from Chicago.

The lower court rightfully attached significance to the level of the divisions voluntarily accepted by appellants on California and Florida citrus. (R. 258.)

IV. A group allegation of confiscation, such as is made in this case, has no foundation in law. *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440. *Mis-*

souri Rate Cases, 230 U. S. 474, 508–509. The petitions here fail to allege any joint interest in or right to the properties used in transporting the traffic or the revenues derived therefrom. While divisions may be prescribed by groups or in the aggregate (*New England Divisions Case,* 261 U. S. 184) they may not be pronounced confiscatory in the aggregate; to do so confuses legislative and judicial action.

ARGUMENT

PRELIMINARY STATEMENT

It will be noted that the Commission's order is twofold in nature: It first precribes just, reasonable and equitable divisions for the future, and then requires, retroactively, a "restatement of accounts" from the filing of the complaint, November 22, 1930. Insofar as the divisions of the rates for the future are concerned, these went into effect June 1, 1934. (R. 1628.) The retroactive portion of the Commission's order, which may be referred to as an exercise of a quasi-judicial function, was construed by the District Court—not as an order for the payment of money such as contemplated in Section 16 (1) of the Act,—but "the order merely requires that an account be stated, and that the amount due the southern lines as a whole be ascertained, leaving to them to make collection in such manner as they may see fit to pursue." (R. 262.) No error was assigned to this holding. Under such circum-

stances the question arises whether such an order of the Commission, speaking now only of that portion of its order dealing with the past, is justiciable at all. To us the order is nothing more than a mere procedural step in the Commission's administration of the Act, a step which may in the future lead up to the issuance of an order upon which appellants will be entitled to their day in court. (Section 16 (2); *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448; Cf. *United States* v. *Los Angeles R. Co.*, 273 U. S. 299).

I. The unsupported allegations of the petition are insufficient to establish confiscation

To support a charge of confiscation, good pleading requires that the petition set forth facts upon which such a serious charge may be based. *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151.

In *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298, a confiscation case, this Court said:

> * * * it may be supposed that, other conditions being the same, a reduction in rates found to be excessive will cause a loss in revenue; and the question is not simply as to the amount of reduction but whether the rates as fixed would allow a fair return. *The bill does not show the value of the property employed, the expenses of operation, or the return which would be permitted under the rates prescribed.* (Id. 315) [Italics supplied.]

To the same effect is the decision of this Court in *Aetna Insurance Co. v. Hyde*, 275 U. S. 440, 447–448.

In *Missouri Rate Cases*, 230 U. S. 474, this Court held that a finding of confiscation could not be based on a particular valuation in the absence of clear and convincing proof that the value actually existed and that the different items of property were estimated respectively by correct methods and in accordance with proper criteria of value. In that case, this Court said:

> * * * We can reach no different conclusion from that stated in the decision to which we have referred, that, *in an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted with respect to a subject so intricate and important should not be accepted as adequate proof to sustain a finding of confiscation. Minnesota Rate Cases, ante.* p. 352. (Id. 507.) [Italics supplied.]

(See *Atlantic Coast Line Railroad Co.* v. *Florida*, 203 U. S. 256, 260.)

In the closely analogous divisions case of *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, this Court, in passing upon a claim that the divisions there prescribed resulted in confiscation, said:

> Appellants claim that the Commission's order, if enforced, will operate to deprive them of their property without due process

of law in violation of the Fifth Amendment to the Constitution.

It is well-established by the decisions of this court that, in order to invoke such constitutional protection, the facts relied upon to prevent enforcement of rates prescribed by governmental authority must be specifically alleged and from them it must clearly appear that the enforcement of the measure complained of will necessarily deny to the utility the just compensation safeguarded to it by the Constitution. *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447–8, and cases cited. Here the joint rates themselves are not assailed as too low, but the claim is that the prescribed divisions are confiscatory. The same rules as to pleading and proof apply to orders prescribing divisions as to laws fixing rates. There is no allegation in the complaint, or evidence in the record to show, that any division to any of the appellants will not yield operating expenses chargeable to the service covered by it plus a reasonable return on property value fairly attributable to that service. There is no foundation in the record for the contention. (Id. 88–89.)

In *Wood* v. *Vandalia R. Co.*, 231 U. S. 1, 3–4, a confiscation case, this Court said:

There was no proof of the value of the complainant's property within the State of Indiana or of the return it received from its entire intrastate business. Nor was there proof of the value of that portion of its road

> which was affected by the order, or of the return from all of its intrastate business upon that part of its lines. No attempt was made to supply proof of that sort. For all that appears, the Vandalia Company might enjoy, notwithstanding the enforcement of the rates in question, ample revenue from its intrastate operations to give it a fair return both as to all its lines within the State and also as to that portion to which the order referred.

(a) Neither the original nor the intervening petitions allege confiscation with sufficient definiteness and certainty

In the amended petition the original petitioners, Pennsylvania Railroad, Baltimore & Ohio Railroad and Richmond, Fredericksburg & Potomac Railroad, allege:

> That using statistics for the year 1929, and allocating expenses to citrus fruit traffic on basis of total system freight car miles, petitioners' costs and expenses reasonably chargeable to the transportation of citrus fruit handled by them, together with an allowance for taxes fairly attributable to that service, plus car rental, exceed for particular and typical hauls, and closely approach for others, the total gross revenue in the aggregate and per car that would be received by petitioners from the prescribed divisions. (R. 146.)

The "particular and typical hauls" referred to and used throughout the cost study are 17,324 cars

of citrus fruit which originated, during the 1928–29 shipping season, at points in Florida on the Atlantic Coast Line and Seaboard Air Line, and were delivered by the Pennsylvania or the Baltimore & Ohio "at Altoona, Pa.; Baltimore, Md.; Buffalo, N. Y.; New York, N. Y.; Philadelphia, Pa.; and Pittsburgh, Pa., and other destinations, and constituted 71 percent of all cars of Florida citrus fruit delivered during the shipping season of 1928–29 by the Pennsylvania and the Baltimore & Ohio at destinations in trunk-line territory." (R. 147.)

These 17,324 cars, in other words, include none of the following shipments:

> (1) Cars which originated in Florida on the Florida East Coast Railway;
>
> (2) Cars which were delivered at destinations in trunk-line or New England territories by roads other than the Pennsylvania or the B. & O., and as to which the last named roads were intermediate carriers; or
>
> (3) Cars which were moved to Potomac Yard via the Southern Railway and there interchanged with the Pennsylvania, such cars not passing through Richmond at all. (R. 1330.)

With respect to the total 1928–29 movement of Florida citrus fruit through Potomac Yard, the Commission said:

> * * * In 1928–29 the Pennsylvania received 24,123 carloads of citrus fruit at

> Potomac Yard, and delivered 18,430 of these to final destinations on its own rails. In the same period the Baltimore & Ohio received 4,502 cars and made final delivery of 3,128 of these. * * * (R. 55.)

In other words, during the 1928–29 shipping season there were, over and above the 17,324 cars mentioned 11,301 cars in the movement of which the Pennsylvania or the Baltimore & Ohio participated, and under rates the divisions of which were covered by the Commission's order. (R. 1330.)

The intervening petitioners were thirteen railroads participating in the transportation of citrus fruit via the Virginia gateways to destinations in eastern trunk-line and New England territories, or destinations in central territory, west of the Buffalo-Pittsburgh line. (R. 1.) To central territory the movement from Florida does not pass through Richmond or Potomac Yard at all, and the dividing gateways are such Ohio River cities as Cincinnati, Louisville, etc.

Excepting the allegations in the amended petition covering the 17,324 cars before referred to, neither the original nor the intervening petitions set forth the subdivision of the revenue between the various participating roads operating north of the dividing gateways; or the costs and expenses alleged to be incurred by each petitioning road individually (other than the general averment in the original petition that the costs of the petitioners, Pennsylvania, Baltimore & Ohio and R. F. & P., on

other shipments "are relatively greater" than on shipments to the destinations named in the petition) (R. 16); or to what extent or in what way each individual petitioner may have participated in the transportation of the traffic. Furthermore, in neither petition (and here the 17,324 cars are included) is there any averment that, in the subdivision as between themselves of the revenue accruing north of the dividing gateways, the amounts received by the several individual petitioners are reasonable. Appellant's principal witness, Mr. Hodkinson, testifying before the District Court on this point, said:

> I haven't shown as to any of these shipments which go beyond the lines of the Pennsylvania that [what] the apportionment of the revenue is as between the Pennsylvania and the lines beyond the Pennsylvania. * * *. (R. 1331.)

With the facts as thus stated, the significance of this Court's statement in *Beaumont, S. L. & W. R. Co.* v. *U. S.*, 282 U. S. 74, 88–89, (*ante*, p. 43) becomes more pronounced.

And the case of *Aetna Insurance Company* v. *Hyde*, 275 U. S. 440, cited in the *Beaumont case*, is of importance. This was a suit jointly brought by numerous insurance companies operating in Missouri to enjoin the enforcement of state-made rates for the insurance business, as being confiscatory and repugnant to the Fourteenth Amendment. A writ of certiorari was granted to review a decree of

the Supreme Court of Missouri dismissing the bill. The writ was dismissed, this court (p. 447) saying:

> The complaint was framed to secure judicial review (Section 6284) of the determination of the respondent. The ground of attack was that the aggregate profits were not excessive and that the aggregate collections permitted under the reduced rates were too low. Allegations asserting in general language that the findings, order, and reduced rates are confiscatory and repugnant to the 14th Amendment are not sufficient. In order to invoke the constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of state law must be specifically set forth, and from them it must clearly appear that the rates would necessarily deny to the plaintiff just compensation and deprive it of its property without due process of law. * * *.

In that case the court also said (at pp. 446–447):

> * * * the reduced rates are applicable to the business of all companies alike and without regard to the amount of the past or prospective profits or losses of any of them. And the attack is by joint action of all the companies. It is not claimed by or on behalf of any company that, when applied to its business, the reduced rates are or would be too low to permit the company to make a reasonable profit or to have just compensation for its contracts of insurance.

> No company receiving just compensation is entitled to have higher rates merely because of the plight of its less fortunate competitors. Companies whose constitutional rights are not infringed may not better their position by urging the cause of others. * * * Rates sufficient to yield adequate returns to some may be confiscatory when applied to the business of others. But the latter have no constitutional right to prevent their enforcement against the former. The Fourteenth Amendment does not protect against competition. Moreover, "aggregate collections" sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts of insurance written by it. It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business.

In this case, in an effort to obviate these fundamental defects, the original petition was amended. The amendment sets up, with respect to the 17,324 cars which were delivered either by the Pennsylvania or the Baltimore & Ohio, an apportionment of revenue between the R. F. & P., on the one hand, and the Pennsylvania or the B. & O., on the other; the amount of the alleged deficit to the three railroads in the aggregate; and an assignment of a

deficit of $65,578.90 to the Pennsylvania, and a deficit of $1,259.56 to the R. F. & P.; while as to the B. & O., it is averred that there would be "a very narrow margin" over estimated costs and expenses, and a "nominal return" upon the value of the property used in the service of transporting citrus fruit. (R. 146–147.) Appellants' Exhibit No. 10 (Hodkinson-planographed) shows the basis of this apportionment, which appears to be on basis of percentages varying in amounts dependent upon the final destination of the traffic. But nowhere is it either alleged or shown that this apportionment is a reasonable one, or that the R. F. & P. may not, in some instances, receive too much and the Pennsylvania too little, while in other instances the reverse of this may be true. (R. 1331–1332.)

II. The order is not void on the ground of confiscation

Before passing to a detailed discussion and criticism of the evidence concerning transportation costs on which appellants rely to prove their allegations of confiscation, it seems worth while to point out that perhaps no field of inquiry connected with railroad regulation presents so many vexing and unsettled questions as the attempted ascertainment of transportation costs, particularly those related to particular kinds of traffic. The difficulties surrounding the subject have been well summarized by Professor Sharfman in the latest volume of his series of studies of administrative law and procedure governing the work of the Commission, pub-

lished within the past thirty days. Professor Sharfman says:

> In point of fact, if the Commission has been less restricted than would be expected by the very substantial cost minimum, the reason lies largely in the great difficulty of making fully persuasive showings of cost in connection with individual traffic movements. An enormous amount of cost data has at all times been supplied by shippers and carriers in contested cases, and the Commission appears usually to have analyzed and weighed such evidence carefully. But very often contentions based on cost have been altogether rejected, and severe criticisms have on many occasions been directed at the cost calculations employed in support of claims of reasonableness or unreasonableness. Most frequently, perhaps, this outcome has been the result of dependence by the parties upon statistical averages possessing scant probative force for the particular situations at issue. Specific rates have often been supported or attacked in terms of the relation existing, on a ton-mile basis, between the revenue derived from them and from all traffic taken together. This approach is obviously defective, since it assumes that the same rate of profit should be derived from each description of traffic. Similarly, calculations have often been submitted of the average cost of operation per ton-mile for all traffic, and the rates at issue have been compared with

this average ton-mile cost. Such a procedure is equally defective, since it assumes that indirect costs burden all traffic proportionately, ton for ton, regardless of the loading characteristics of the specific tonnage as compared with those of the tonnage entering into the average. Solution of the problem of cost distribution, difficult at best, must certainly take into account the various features of commodities, of which weight is only one, that affect the amount of transportation capacity which they utilize. Such ton-mile comparisons are also invalidated where the average length of haul of the traffic in question differs in substantial degree from that of the traffic with which it is compared, since distance unquestionably has a direct, though not a proportionate, bearing upon cost. The pitfalls of averages are so numerous that the Commission has been compelled to act independently of much cost evidence of this character which has been presented, and even where the cost studies have been concerned more specifically with the conditions affecting the particular traffic under consideration, serious questions have arisen in connection with the selection of sample movements and the allocation of indirect expenses. (I. L. Sharfman—The Interstate Commerce Commission, A Study in Administrative Law and Procedure, Part Three, Volume B, The Commonwealth Fund, New York, N. Y., 1936.)

One reason for the non-existence of any reliable basis of railway cost accounting has undoubtedly been the negative attitude toward the subject taken by the railroads as a whole. They have generally taken the position that the costs of handling individual traffic were not susceptible of ascertainment, and that such costs if ascertained would be of doubtful relevance. For the most part, where they have sought to rely on cost evidence for defensive purposes they have resorted to statistical averages, as here.

In view of this unsatisfactory situation it is not surprising to find recognition on the part of Congress that a corrective stimulus from outside the railroad industry will be required if cost accounting is to play the important part which it should in the broader problem of transportation regulation presented by the development of new forms of transportation. In section 13 of the Emergency Railroad Transportation Act, 1933 (U. S. Code, title 49, section 263) it is made the duty of the Federal Coordinator of Transportation among other things "to investigate and consider means, not provided for in this title, of improving transportation conditions throughout the country, *including cost finding in rail transportation.*"

This subject of cost finding is now under active consideration both by the Coordinator and the Commission. Although the results of these studies have not been announced, it may safely be said that

one of the aims of the studies will be to avoid the "pitfalls of averages," referred to by Professor Sharfman, of which the instant case affords well-defined examples.

In their brief appellants strive to make it appear that it was impracticable to make what might be termed a direct cost study of citrus transportation costs because of the fact that the Commission's findings were not announced until July, 1933, and the basis of divisions was prescribed for retroactive application subsequent to November 22, 1930. It is hinted that such a direct cost study could not be made for traffic which had already moved. In connection with this attempt to excuse their failure to bring forward a real cost study instead of a statistical average, it should be remembered that appellants profess to have been dissatisfied with their citrus divisions for many years prior to November, 1928, when they enforced a new basis of divisions on the southern lines. We have here what amounts to an admission that their dissatisfaction was not based on any serious effort to investigate their costs of handling this traffic. After the southern lines filed their complaint, assailing the divisions in November, 1930, more than six months elapsed before the hearings began. In that period appellants had ample opportunity to assemble data bearing on transportation costs in the shipping season of 1930–31 but they did not do so. The record statements of appellants' own

witnesses show that their failure to produce a direct study of citrus transportation costs was due to lack of faith in their ability to prepare a convincing study of that kind, and they therefore chose to adopt the traditional railroad attitude that the only available method of approximating costs on this traffic involved a use of average system unit costs. Indicative of this attitude was the statement of appellants' principal statistical witness, Mr. Hodkinson, in the lower court that "it is not possible to establish the cost of handling a particular commodity because that would enter into the realm of speculation." (R. 1224.) Another witness for appellants in the lower court, Mr. Coverston, a railroad statistician of long and varied experience, said (R. 1277):

> There is no known basis for apportioning the operating expenses to a specific traffic. You have first the loading, the speed, and the character of the traffic itself, the weight, the bulky and light commodities, and you run into so many assumptions that no one has ever yet been able to make an accurate study. It is just simply impossible.

The earliest date to which the Commission's findings apply by retroactive application is November 22, 1930. Thus the findings affect traffic which moved in the last month of 1930, the year 1931, and subsequent years. It is that period to which the alleged confiscation, if any, applies. Yet appellants rely in their evidence concerning confisca-

tion on a showing of average carload costs incurred in the year 1929. This year was selected presumably because the representative movements of traffic to which they applied their cost theory were for a test period in 1928–29. The record lacks evidence to show that average costs of transportation in 1929 were representative of those in the following years. It is well-known that 1929 was a year of abnormal industrial activity which had an important effect on railroad transportation, and that 1930, 1931, and 1932, come within a widely different industrial era. Transportation costs per unit of traffic vary widely from year to year. In *Emergency Freight Charges, 1935,* 208 I. C. C. 4, 22, the Commission said on this subject:

> Average freight operating expenses per 1,000 revenue ton-miles were 10 percent lower in 1933 than in 1932, and continued a downward trend which began in 1922. The reduction in average freight transportation expenses per 1,000 revenue ton-miles was about the same. Fuel consumption per 1,000 gross ton-miles in 1933 averaged slightly lower than in 1932, being only slightly above the average for 1931, the low-record year in the period since 1920.

It would seem that if appellants' average car-mile theory is relied upon as having even slight probative value on the issue of confiscation, the statistical averages so used should cover the period for which the Commission's findings here assailed are applicable.

(a) The average car-mile expense unit or system-average cost does not furnish a reasonable basis for approximating the cost of handling citrus fruit

The so-called cost exhibits presented by appellants in the lower court are described in appellants' brief as well as in the opinion of that court. Accordingly no further description of the exhibits is called for here. For the purpose of the subsequent discussion it is sufficient to point out that they are nothing more than a series of rather elaborate arithmetical computations based on the assumption that the cost incurred by a given railroad of carrying a carload of citrus fruit one mile and of the empty car in return movement one mile is the same as the average car-mile cost of the given railroad based on all its freight traffic.

Appellants concede in effect that ordinarily it would be unsound to use a system unit cost to approximate the cost of handling a particular commodity, but contend that in this particular case the use of such costs is supported by statements in the Commission's report in the instant case and also by action of the Commission in another case, *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, commonly known as the *Florida Log Case*. We shall first consider whether the use of the average car-mile cost theory finds any support in the Commission's decision in the present case.

At page 757 of its original report (R. 73) the Commission said:

> The voluminous evidence descriptive of operating conditions cannot be translated into terms of cost for the purpose of comparing the two groups of roads in this respect. In general, it indicates that citrus fruit, like other perishable traffic, is given a specialized, expedited service which is undoubtedly more expensive than the ordinary run of freight, and that both the eastern and the southern carriers have equipped their plants and operating organization to this end.

Since the appellants prominently stress the statement above quoted "that citrus fruit, like other perishable traffic, is given a specialized, expedited service which is undoubtedly more expensive than the ordinary run of freight," and use it as one of the important links in their argument in favor of the average car-mile cost theory, the statement is worthy of some discussion at this point. The context will show that the Commission had in mind the evidence offered by the operating officials of northern as well as southern carriers, who had described in considerable detail the physical handling of the citrus traffic, stressing the difficulties encountered in connection with this traffic which were not present in the transportation of nonperishable traffic. It will thus be seen that the effect of the statement merely is that, like all perishable traffic, citrus fruit requires transportation service somewhat more expensive than that performed on non-perishable or what is sometimes

termed "dead freight", assuming an equality of conditions other than the character of the commodities compared. The statement can not possibly be understood as committing the Commission to the view that the car-mile costs of handling citrus fruit are the same as, or higher than, the average car-mile costs of all traffic, because nowhere in the record before the Commission had the appellants suggested the use of this theory, and the Commission consequently could not have had the theory in mind in making this statement. Furthermore, appellants' use of the theory is squarely counter to fundamental principles underlying the interpretation and application of railway statistics to the problems presented in cases such as this, as we shall hereafter show.

The *Florida Log Case* dealt with the question whether intrastate log rates in Florida prescribed by State authority for application on the Atlantic Coast Line were so low as to cause unjust discrimination against interstate commerce. Much of the evidence related to transportation costs. The interested railroad submitted a study of out-of-pocket costs in which certain expenses of its system freight traffic were used. It also presented evidence of actual out-of-pocket expense based on a certain representative movement of logs, which for special reasons were actually ascertainable. In other words, it was possible to obtain what amounted to direct knowledge of the cost of a large

part of the Florida log movement. It was also possible to show for reasons set forth in the report that the costs on the Atlantic Coast Line in Florida were higher than those for the system as a whole. The Commission stated that this fact justified the use of the system figures in making an estimate of the log costs, despite the fact that "ordinarily it would be unsound to use a system unit cost to determine the cost in particular State." However, the Commission went further in safeguarding the use of the system figures. The Florida State authorities submitted no affirmative evidence dealing with costs, but made numerous criticisms of the railroad cost study. The Commission applied these criticisms to that study, in effect reconstructing it, and as so reconstructed it was set forth in an appendix to the report. It appears clearly that in the reconstructed study the nonhaulage or terminal expense was separated from the line-haul or haulage expense. Accordingly the study there relied upon to some extent by the Commission did not involve the fault of pyramiding the terminal element, thereby conforming to one of the important principles applicable to cost studies, which has been flagrantly violated in the cost studies presented by appellants in the instant case, as we shall later show more particularly. The cost study in the *Florida Log case* therefore differed radically in plan from that here relied on by appellants. Furthermore it was only part of the entire evidence, which as

pointed out, included direct cost studies, upon which the Commission drew only the conclusion that the revenue from the intrastate log rates failed to cover the full cost of the service and did not undertake to say what that full cost was. Far from supporting the appellants' position in the case at bar, the *Florida Log case* illustrates the fact that system average costs may be safely used only in exceptional cases when their use can be safeguarded by application of well-known elementary principles of railway cost accounting.

Appellants produced as witnesses before the lower court a number of operating officers, who testified generally to the effect that the handling of the general run of traffic was less expensive than that of citrus fruit or other perishable traffic. The collective testimony so presented was little more than a reiteration of the Commission's statement to the same general effect, and like that statement affords no support for the average car-mile cost theory. These witnesses were without figures to show in dollars and cents the differences which they stressed. (R. 1341, 1363, 1376). For the most part they contented themselves with mentioning various traffic and transportation characteristics specially applicable to perishable traffic, including citrus fruit. These witnesses were silent as to the peculiar characteristics affecting the wide variety of other articles entering into the aggregate of freight traffic on which average figures are based. In 1929, the

less-carload traffic of the Pennsylvania Railroad was more than eight times as great as its citrus fruit traffic. (Ex. 85) The characteristics of this traffic are such as to make for high unit costs, which probably tend to raise average costs much above those on citrus fruits. Animals and the products thereof, which are also notoriously expensive to handle, in 1929 provided the Pennsylvania with three times as heavy traffic as citrus fruit. (Ex. 85). The products of mines, which entail peculiar operating burdens because of origin service on branch lines, frequently in mountainous regions and line-haul service in heavily laden trains through the more rugged sections of the Appalachian States, furnished the Pennsylvania more than 200 times as much traffic in 1929 as citrus fruit. (Ex. 85). The particular elements of average system cost for which these other categories of traffic are responsible afford the broadest possible field for speculation and conjecture which appellants' operating officials were careful not to enter.

It is plain from the testimony of appellants' own witnesses that the latter regarded the cost studies as constituting a kind of rule-of thumb method of arriving at something which might perhaps be used as a standard of costs in the absence of a scientific method. Several of them expressed the view that the car-mile basis was a more nearly correct basis than the gross-ton mile basis, another rule-of-thumb method sometimes used by railroad statisticians (R. 1268, 1340, 1380). One stated that

use of the car-mile basis was proper "in attempting to approximate the expense" (R. 1358). Another called it the "best method of estimating the expense that I can get," (R. 1372) and still another, "the best practical way in which to estimate the expense." (R. 1380.) The faint praise given the theory by these witnesses is striking. Being at most an attempted approximation of expense, as frankly and aptly characterized by appellants' witness, Menaugh (R. 1358), the car-mile theory belongs to the realm of conjecture rather than of fact. The lower court fully understood the nature and the limitations of the theory, saying (R. 259):

> * * * the evidence does not convince us that system average freight car mile cost may be safely used to ascertain the cost of carrying citrus fruit. There are indeed many expressions of opinion in general terms that citrus fruit is more expensive to transport than "the ordinary run of freight." But the meaning of this phrase is uncertain, and we have no assurance that the cost of carrying the ordinary run of freight is the same as the system average car mile cost.

This view of the theory, it should be remembered, was expressed by the lower court after hearing the theory expounded and applied in the voluminous evidence offered *de novo* by appellants' witnesses. In rejecting the theory as conjectural and speculative the court is not chargeable with disregarding

evidence, for the reason that the theory is argumentative in nature and not factual.

We shall now point out some of the well-known infirmities attending the use of this "statistical generalization", as the lower court termed it, in estimating the transportation costs of a particular kind of traffic.*

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*The lower court in its opinion (R. 247) explained the manner of arriving at the car-mile unit as follows:

The total freight car miles, including both loaded and empty cars, and also the total operating expenses and railway taxes, were ascertained for each petitioning carrier from the statistical reports furnished by it to the Interstate Commerce Commission, and these costs were separated as between freight and passenger traffic in accordance with a formula prescribed by the Commission for such separation. Deductions from total freight expenses were made for freight train, car repairs, depreciation, and retirements, since citrus fruit is moved in refrigerator cars, not owned by the carriers but rented at the rate of 2¢ per mile. Then the net freight expense was divided by the total freight car miles and a unit expense per car mile for all freight traffic was ascertained.

It was also necessary to ascertain the investment in road and equipment used in the service in order to calculate the proper return on investment to which the carrier was entitled, and for this purpose, to ascertain the freight proportion of the total investment of the carrier. This was done by taking the total investment as reported to the Commission and computing the freight proportion thereof by applying to the total the percentage which the net operating freight expenses, obtained in accordance with the above-mentioned formula, bore to the total operating expenses. In other words, the investment allocated to freight was determined by the ratio that the net operating expenses for freight bore to the total operating expenses.

(b) The system average or car-mile cost theory is fatally weak in making no distinction between what are termed line-haul costs and those commonly referred to as terminal and overhead costs

It requires no technical knowledge of railway operation and accounting to understand that there are certain elements of cost which vary to a certain extent each time a freight car is moved over a mile of track, in other words, with the number of car miles: among these elements being fuel, repairs to cars and locomotives, wages of train crews, and to some extent replacements and repairs of roadbed and rails. There are other items of expense more or less fixed, which do not vary with the number of car miles, among these being maintenance of terminals, wages of employees operating the terminals, salaries of supervisory officials, and other overhead expense. It is a universal rule that revenue per ton per mile, even upon a single commodity over the same railroad, varies with the length of the haul, and for very good reasons.[9] Cost of service is made up of two elements. Cost of terminal operations is one element and it is constant, regardless of the length of the haul. The other element is the cost of the line haul, which varies with distance.

If the cost of hauling any given commodity for a distance, say, of 200 miles could be accurately determined, the figure would of course include one component amount to cover the line-haul move-

[9] Railroads—Rates and Regulation, by William Z. Ripley, (1916) p. 103.

ment of the car, dependent more or less directly on the number of miles of haul, and another amount to cover the terminal expense of originating, delivering, or interchanging the car, which being constant would have been the same if the car had moved 400 miles. Therefore, having ascertained the total cost of transporting a car 200 miles, manifestly one would not be warranted in multiplying that cost by two to find the expense of moving it 400 miles or in dividing it by two to find the expense of moving it only 100 miles. This simple mathematical fact must be ever kept in mind in undertaking to use system average car-mile costs to measure the expense of particular movements of traffic. In applying this method one starts with aggregate operating expenses, which embrace the two elements of terminal and line-haul expense, as before stated. The average car-mile expense is obtained by dividing this aggregate expense figure by the total number of car-miles of the given railroad, and the average expense, the resulting quotient, includes the two elements in the same ratio as they occur in the dividend, i. e., the aggregate expense. If the railroad had transported its total volume of traffic twice as far as it actually did, its aggregate expense would not have been doubled, as before pointed out, because the terminal element is constant. For the same reason it is just as fallacious and mathematically unsound to multiply the average car-mile expense by the number of

miles of haul for any given movement of traffic in an attempt to find the cost of that movement. It thus becomes plain that the average car-mile cost for any railroad is inevitably and inextricably tied to the average haul of that railroad on all its traffic. When it is applied to movements of greater length than the average, the terminal component is duplicated, or, as is often said, "pyramided." Such pyramiding is bound to occur when average costs, either per ton-mile or per car-mile, are used to measure actual costs of particular traffic without segregating terminal and line-haul costs. In this case appellants made no effort at such segregation. Moreover their own witnesses conceded the correctness of the principle which we here state. Witness Menaugh, an operating official of the Pennsylvania Railroad, stated (R. 1358):

> Car mile units do not, in my opinion, pyramid terminal expenses *when the average load hauls are about the same.* [Italics supplied.]

This amounts to a tacit admission that the theory is faulty when it is applied to hauls which are not "about the same" as the average. In their use of the theory appellants have not limited it to those which are "about the same" as the average on all traffic.

The appellants' principal statistical witness, Mr. Hodkinson, made an effort to allay the criticism of pyramiding when he stated before the lower court: (R. 1322.)

> In applying the system figures, based on the average haul of all traffic to hauls in excess of that average haul, you have an overstatement of the cost on an average car, but I doubt if an overstatement of the cost for a longer haul would be quite so large as the understatement in the cost for the shorter haul. When you take into consideration both the short hauls, the somewhat longer hauls and the long hauls and get an average of all and that approximates the system average I think you come pretty close to having a true picture.

Obviously the witness' thoughts above expressed amount to no more than a surmise. He offered nothing to show that there is a mathematical relation between car-mile costs for hauls of different length.

While Mr. Hodkinson stated that there was no duplicating or pyramiding of the terminal cost factor by the use of system averages, the fact remains that at no stage in his cost study has he segregated terminal and line-haul costs.

Probably as much as 46 percent of the total freight expenses of the Pennsylvania Railroad in 1929 were terminal expenses which did not vary directly with the number of car-miles performed.[10]

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[10] The operating expenses, excluding depreciation, directly associated with yard operations in terminals and also with road operations are included in accounts numbered 202, 204, 206, 208, 210, 212, 214, 216, 218, 220, 221, 223, and 225, as indexed in the Commission's classification of accounts followed in the carriers' annual reports. These are segregated

The average haul per ton of all traffic on the Pennsylvania in 1929 was 210 miles (R. 1323), which, with an average empty haul of 58 percent (R. 249) would result in an empty movement of 122 miles, making a total loaded and empty movement of 332 miles. Because the loaded and return empty movement of a car carrying citrus fruit to New York, for example, is one-third greater (or 446 miles—Ex. 3) than that indicated above for the average movement of the Pennsylvania's freight, appellants assume that the cost is one-third greater, although as before shown, approximately 46 percent of the expense is constant and does not increase with the length of haul. Appellants' computations have the effect of overburdening the citrus fruit traffic, as contrasted with all traffic, by more than one-third of the terminal expense, a constant factor which does not vary with the length of haul. By reason of this failure to apportion operating expenses between terminal and line-haul the appellants' computations have the effect of distributing on a car-mile basis over the entire haul of the citrus-fruit traffic an amount in excess of $128,000,000—representing the yard or terminal

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as between both freight and passenger, and yard and other. Other accounts pertaining directly to yard operations are 227, 373, and 376–391, inclusive. Other accounts pertaining directly to road operations are 392–402, inclusive, 412, and 413. Assembling these freight costs in 1929 for the Pennsylvania results in a total for yard of $83,072,265, and for road $96,801,241, or approximate ratios of 46 and 54 percent, respectively.

proportion of total freight operating expenses of the Pennsylvania, which amount is not properly distributable on a car-mile basis. (R. 1429–1430.) On this subject of pyramiding of terminal costs, the lower court said:

> * * * Pyramiding of terminal costs is illustrated in the application of the car mile unit cost to the movement of citrus fruit on the Pennsylvania in this year. The system average haul for the loaded and empty movement combined was 332 miles; while the average movement of citrus fruit was 41[illegible] miles, or an increase of more than 20%, involving an overstatement of terminal costs in the cost studies of this railroad. The freight expenses of the Pennsylvania, allocable to yards and terminals in 1929, amounted to $128,006,991, and when 20% of this figure is divided by the total car miles on the system, (2,741,963,000) there results the sum of .93c per car miles, by which the terminal costs have been overestimated. This figure, applied to the total Pennsylvania citrus fruit car miles in trunkline territory in the 1928–1929 season, (6,006,282), shows an overstatement of $55,858.42 in the aggregate cost as computed by the Pennsylvania for that territory. (R. 255.)

The inclusion of less-than-carload freight in the average car-mile cost for all freight, increases that cost somewhat, but as car-miles and expenses are not segregated between carload and less-than-carload freight, it is impossible to correctly determine

and deduct the cost of transporting the latter. The terminal cost per car for less-than-carload freight is relatively high, because in addition to the ordinary terminal expense it includes the platform cost for loading and unloading the freight, which is not involved generally in the case of carload freight, and it also includes greater clerical expense than for carload freight on account of the much greater number of consignments involved per car. The line haul cost is also high, because in addition to the ordinary line haul expense it includes the transfer expense at intermediate transfer points. (R. 1414–1415.)

Appellants seek to avoid the condemnatory effect of the criticism based on pyramiding terminal expense by pointing out that the average haul of the Pennsylvania on Florida citrus traffic delivered at points on its line in 1929 was about 220 miles, whereas its average haul per ton of revenue traffic in that year was 210. Since the expense figures used in the cost studies are based on non-revenue as well as revenue traffic, it should be noted that the average haul per ton of all traffic, revenue and nonrevenue, was only 203 miles. When we are dealing with averages it is by no means clear that a difference of 17 miles is negligible. Furthermore, since the cost unit used by appellants is an average car-mile cost, it is the average movement *per car* and not per ton which is pertinent in this connection. Appellants produced nothing to show the

average movement per car on which their average car-mile costs are based, but there is reason to believe that the average haul per car may be materially less than the average haul per ton in view of the high average loading per car for the Pennsylvania and the Baltimore & Ohio.

Appellants' attempt to minimize the difference between the average haul of citrus fruit and the average haul on all traffic bears out the truism heretofore explained that average costs per car-mile afford an accurate index only to the cost of moving cars *for the average distance for which the total number of cars are moved,* this average in the present instance being unknown, as above pointed out. Appellants' argument on this point ignores the further and more significant fact that the average car-mile cost is an index to nothing else, although they apply it to hauls of any and all lengths. Their computations use the same average car-mile cost in estimating the expense to the Pennsylvania Railroad in moving a car of citrus fruit from Potomac Yard to Baltimore, 45 miles, as in moving a car from Potomac Yard to Buffalo, 440 miles. We have already shown that because the aggregate expense of the Pennsylvania Railroad, with an average haul of 210 miles on all traffic, is a certain figure, it would not follow that the aggregate expense would have been twice as great if the average haul had been 420 miles instead of 210. Yet the appellants ask the court to assume that to be the fact

with respect to citrus fruit. The criticism relating to pyramiding of terminal expense is not disposed of merely by calling attention to the circumstance that the average haul of citrus fruit in the case of one railroad happened to be the same as that of all its traffic. Quite apart from the question of applying average costs for all traffic to comparable hauls of citrus fruit, the error lies in pyramiding terminal costs by estimating the expense of handling all traffic for distances of 300 or 400 miles by use of average car-mile costs based on a haul of 210 miles. Appellants cannot, and do not, deny that pyramiding necessarily is present in applying the theory to the longer hauls, such as those to Pittsburgh and Buffalo, for example. Appellants' own computations indicate this fact almost to the extent of demonstration. These computations purport to show that the divisions prescribed by the Commission fall short of covering operating expenses on shipments to Buffalo and Pittsburgh by $26 and $15 per car, respectively. (R. 1622J.) These "deficiencies" as appellants term them are far greater than those shown for any other points. For cities less distant, such as Baltimore and Philadelphia, surpluses are shown. (R. 1622J.) Wide disparities of this kind are to be expected when both long hauls and short hauls are measured by the same average-car-mile-cost yardstick, and demonstrate thoroughly the unreliability of such a yardstick for this purpose.

We have previously pointed out that the cost study set forth in connection with the Commission's report in the *Florida Log Case* made a separation between haulage and nonhaulage expense. If, therefore, appellants had made a serious effort here to follow the principles sanctioned by the Commission in the *Florida Log Case,* as indeed they profess to have done, they would have presented a cost study in which the terminal element was separated from the line-haul instead of being pyramided as it is here.

In another very important respect appellants have disregarded the principle heretofore discussed that average car-mile or ton-mile costs are without significance except in connection with the average hauls to which they apply. Appellants appear to regard it as vital to their case to show that operating expenses on the portions of the Pennsylvania and the Baltimore & Ohio principally used in the transportation of citrus fruit are higher than those for the two systems as a whole. For proof of this fact they rely strongly upon some figures set forth on page 54 of their brief on the prior argument, purporting to show that average car-mile expenses for the Baltimore division of the Baltimore & Ohio and the eastern region (including the New York zone of the Pennsylvania) exceed those on the two systems as a whole. There is nothing whatever to indicate the average movements per car on which any of the average car-

mile expenses compared on page 54 are based. For aught shown either on brief or in the testimony the average haul in the eastern region of the Pennsylvania may be, and probably is, considerably less than the average for the system, in which event the average car-mile cost in the eastern region could and would be much greater than the average for the system, whereas for hauls of the same length there would be no difference. We reiterate that comparisons such as these without a showing of comparability of average hauls are without any value in an attempt to compare operating costs. The only other evidence on this point mentioned by appellants consisted of a bare oral statement by one of their witnesses on rebuttal that he had made a check of transportation expenses on the divisions north of Potomac Yard and found that they were 14.2 cents per car-mile, again without any indication of the average haul or of the period of time covered by his observations. This estimate was not supported by any underlying data permitting a check of the witness' conclusions. The record is wholly without any trustworthy evidence to show that operating costs in general on the lines of the Pennsylvania and the Baltimore & Ohio principally used in the transportation of Florida citrus fruit are higher than those for the two systems as a whole.

(c) The system average or car-mile cost theory is faulty in that it assumes the cost of hauling a loaded car one mile to be the same as that of hauling an empty car the same distance, and gives no consideration to relative weight

Only slight knowledge of railway operation will enable one to realize that freight cars may be moved with less expense when they are empty than when they are under load. For example, they are handled in longer trains with a saving of wages and fuel, as well as maintenance of way, per car mile, in comparison with the loaded movement. If the cost is apportioned between loaded and empty cars on the basis of the relative weight transported, the resulting costs per loaded and per empty car-mile are quite different.

For instance, using the Pennsylvania for illustration, witness Hodkinson determined the average cost per total car-mile, loaded and empty for all freight, to be 14.89 cents, inclusive of operating expenses, taxes, and interest on investment. (Ex. 1.) The ratio of empty to loaded car-miles for all freight is shown to be 58.3 percent (R. 249), the average tare weight of all cars to be 22 tons (R. 1232), and the average load per car to be 31 tons (R. 1450) making a total gross weight of 53 tons for car and contents. On the basis of 1,000 loaded car-miles there would be 583 empty car-miles or a total of 1,583 loaded and empty car-miles. Applying the average car-mile cost of 14.89 cents above, results in a total cost of $235.7087. If this is apportioned between loaded and empty car-miles on the basis of

the relative gross ton-miles involved (53,000 for the loaded car-miles and 12,826 for the empty car-miles), and the respective amounts so obtained divided by the respective loaded and empty car-miles, this results in an average cost of 18.98 cents per loaded car-mile, and of 7.88 cents per empty car-mile. If we take the loaded haul of a car of citrus fruit of 236 miles from Potomac Yard to New York, in connection with which there is an empty haul of 210 miles, and apply to both the loaded and empty car-miles, appellants' average car-mile cost of 14.89 cents, we obtain a total cost of $66.41 per car. On the other hand, if we apply to the respective loaded and empty car-miles the segregated car-mile costs of 18.98 cents for the loaded haul and 7.88 cents for the empty haul above, we obtain a total cost of $61.34 per car, which indicates an excess of $5.07 per car on the basis of the formula cost.

The above computation does not take into account the fact that the average car-mile cost is otherwise excessive for use in estimating the cost of citrus fruit. It is excessive because total car-miles, loaded and empty, for all freight are based upon a lower empty haul ratio than for citrus fruit, and hence the average cost per car-mile is too high for application to citrus fruit with its much higher empty haul ratio and relatively greater number of total car-miles, loaded and empty.

As before shown, the average traffic movement on the Pennsylvania in 1929 was 210 miles loaded

and 122 miles empty, the loaded car-miles being 63 percent of the total. In the case of the citrus movement to New York, here used as illustrative, the loaded movement was but 53 percent of the total. Appellants would have us believe that the car-mile cost covering the average movement in the first case stated properly measures that of the second, despite the much greater proportion of the first movement which is under load.

In their computations, appellants treat alike, from the standpoint of the expense of handling such cars, all cars of every description handled on their respective systems in their entirety, regardless of whether empty or loaded and regardless of differences in the actual loadings, thus involving the erroneous assumption that the cost of transporting a car loaded with 50 tons or more of freight is no greater than the cost of transporting an empty car. (R. 1413, 1426, 1473.) Their calculations have the effect of assigning to the return empty movement of the refrigerator cars, in which the citrus fruit moves, the same amount of excessive cost which is assigned to the loaded movement of such car. (Tassin Planographed Ex. No. 1; R. 1473.)

Appellants undertake to answer this criticism by pointing out that the average car-mile expense unit includes the expense of performing all loaded as well as empty car miles, and the overstatement in the case of empty cars is offset by the understate-

ment in respect of loaded cars. This is true when we are dealing with the aggregate of all traffic, but it is not true as to particular traffic unless the ratio of empty to loaded movement in the case of such traffic happens to be the same as that of all traffic. The average ratio of empty to loaded car-miles on the Pennsylvania is 58 percent. (R. 1397.) The ratio of empty to loaded in the case of refrigerator cars used in the transportation of Florida citrus fruit is not shown, but appellants assume it to be the same as that for all refrigerator car movements for the Pennsylvania, 89 percent. It will therefore be seen that the average car-mile of the Pennsylvania for all traffic is based on loaded cars to the extent of 63 percent, whereas the average car-mile for citrus traffic represents loaded cars only to the extent of 53 percent. Disregarding the difference in average carload weight of all traffic and that of citrus fruit for the present, it will be seen that the average car-mile cost is based on a unit which reflects 18 percent more loaded-car service than an average loaded-and-empty car-mile of citrus fruit.

Appellants try to show that this difference is offset by special costs incident to the movement of empty refrigerator cars, particularly those due to expedited service, but this is only one of the several vague elements which reduces the car-mile cost theory to conjecture.

(d) The cost study is defective in assuming that there are no inherent differences in transportation characteristics between citrus traffic and average traffic, which would make for a difference in car-mile cost

Appellants' calculations do not take into consideration the composition of the traffic handled on the respective systems of the Pennsylvania, the B. & O., or the R. F. & P. One marked difference of this kind is in respect of the weight of the lading. The average load per car is greater for all freight than for citrus fruit. The average load per car for all freight is much greater than that for citrus fruit on the B. & O. and Pennsylvania, while on the R. F. & P., A. C. L. and S. A. L., the average load of all freight is not greatly in excess of that for citrus fruit. In 1929 the average carload weight of all traffic on the Pennsylvania was about 31 tons. The average of citrus was somewhat less than 17 tons. It is wholly reasonable to believe that the expense of moving a car of citrus fruit one mile would differ widely from that of moving a car with a lading 82 percent heavier. In 1929 the citrus traffic of the Pennsylvania was .29 of one percent of its total tonnage, and .48 of one percent of its total revenue. (R. 1424.) Plainly the costs of transporting citrus were reflected in the average costs of all traffic to an almost infinitesimal degree. (R. 1424.) The average traffic of the Pennsylvania is made up of commodities having little resemblance to citrus fruit. One may visualize this average by imagining the average

or typical carload handled by that carrier in 1929 as consisting of the following:

	Tons
Products of Agriculture	1.42
Animals and products thereof	.28
Products of Mines	18.75
Products of Forests	1.08
Manufactures and Miscellaneous	8.62
Less-than-carload freight	.74
	30.89

In 1929, 60.71 percent of the Pennsylvania's total tonnage consisted of Products of Mines, such as coal, etc., on which the average loading per car was 55.22 tons; the system average loading of all cars in carload traffic was 37.99 tons, or 21.20 tons in excess of the average loading of citrus fruit. Appellants' computations of "car-mile" costs on a "system-average" basis have the effect of magnifying the computed costs of handling citrus fruit, a light loading commodity, by the excess costs of hauling the large volume of such heavy commodities as Products of Mines, loading 38.42 tons heavier than citrus fruit, and the excess cost of hauling the average of all traffic, loading 21.20 tons in excess of citrus fruit. (R. 1425–1426; 1451–1452; 1466.)

As shown above, the high average loading of the Pennsylvania is attributable to its heavy traffic in products of mines, such as coal and ore, which load heavily. To state the fact in another way, 62 percent of the Pennsylvania's revenue carload traffic in 1929 consisted of mineral products loading 55 tons per car on the average, and this loading largely

influences the system average, the costs for which are assumed to be the same as those for 17 tons of citrus fruit.

The important influence of coal traffic on the average costs of the Pennsylvania and the Baltimore & Ohio deserves special attention in this connection. In several recent cases the Commission has had occasion to pass upon the coal rates of these two carriers, which have stressed the heavy costs incurred by them in the transportation of coal.

In one of these coal cases, *Eastern Bituminous Coal Investigation,* 140 I. C. C. 3, it was pointed out that roughly 40 percent of the entire tonnage of the Pennsylvania and 45 percent of that of the Baltimore & Ohio consist of bituminous coal. Concerning the costs of handling this traffic the Commission said:

> Because of the mountainous character of the country in which the mines in both the northern [those served chiefly by the Baltimore & Ohio and the Pennsylvania] and southern fields are located the assembling costs are unusually heavy. Practically all the coal from the southern fields and most of the coal from the northern fields passes over the crests of the mountains at varying elevations. The average elevation from the northern fields is 2,178 feet and from the southern fields 2,400 feet.

Another decision on the subject of eastern coal rates was *Central Pennsylvania Coal Producers*

Assn. v. *B. & O. R. Co.*, 196 I. C. C. 203, decided in 1933. There the Commission said:

> The mines in both the northern and southern fields are distributed over a wide expanse of mountainous territory and are generally served by branch lines or spurs with sharp curves and steep grades. In both fields the assembling service is difficult and expensive. Generally coal and mine supplies constitute all the traffic on the mine branches. On some, however, there is a small production of lumber and on the Clearfield branch of the Pennsylvania there is a production of clay products and other commodities.
>
> * * * * *
>
> These figures indicate that on the basis of the number of tons shipped per locomotive-hour, the assembling expense on the northern carriers mentioned [the Pennsylvania, Baltimore & Ohio, and New York Central] is over twice as great as that on the Pocahontas lines.
>
> * * * * *
>
> On the three northern lines mentioned about 50 percent of the tonnage was assembled at final assembling points located east of the mountain crests, whereas on the southern lines about 81 percent was assembled at subassembly points from which it moved in road-haul service to final assembly yards located west of the crests of the mountains. From the standpoint of wages, assembling service is more expensive than road-haul service, and to the extent that

> the assembling service in the southern districts is a less proportion of the total transportation service than in the northern districts, the line-haul service is correspondingly greater.
>
> * * * * *
>
> Even though due allowance is made for the differences in conditions on the northern lines and those on the Pocahontas lines as mentioned above, the assembling study indicates that the assembling service from the northern base districts is considerably more costly than that in the base districts on the Pocahontas lines.

Because bituminous coal constitutes 40 percent or more of the total tonnage of the Pennsylvania and the Baltimore & Ohio, it necessarily follows that the expensive assembly service required in originating the coal traffic has a dominating influence in determining the average car-mile costs of these two railroads. As the Commission points out, this service is performed in mountainous regions on branch lines or spurs, having excessive grades and curves, which are not used in the transportation of citrus fruit. It is therefore highly improper to use the average car-mile cost, two-fifths of which merely reflects the expensive coal transportation, as a measure of the cost of the citrus traffic.

It has frequently been shown in proceedings before the Commission that heavy-loading commodities, such as coal, yield relatively high car-mile

earnings in comparison with other kinds of traffic of lighter loading. (See *Investigation and Suspension Docket 26 to 26C,* 22 I. C. C. 604, 620.) For example, in *Eastern Bituminous Coal Investigation, supra,* the Commission prescribed a rate of $2.71 per ton on coal from the Cumberland-Piedmont-Meyersdale district to Baltimore, Md., Washington, D. C., and other points for an average distance of 209 miles. On a car containing 55 tons this rate would yield car-mile earnings of 71 cents. Such high car-mile earnings could only be justified because of the undoubtedly high car-mile costs involved in this movement.

In this connection it is pertinent to quote from this Court's opinion in *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 596–597, as follows:

> * * * The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost the entire cost must be taken into account.

With citrus constituting slightly less than one-third of one percent of the Pennsylvania's total traffic, use of the average car-mile cost theory necessarily makes the cost of citrus dependent wholly on the expense of handling the other 99⅔ percent of the total freight traffic. This large residue of traffic embraces a multitude of different commodities of all descriptions, raw materials, high-grade manufactured products, other perishable freight, livestock, carload and less-than-carload, and many other things, each with its special transportation characteristics, making it humanly impossible to hazard an opinion as to the comparability of transportation costs on such a broad variety of articles and those on citrus fruit, insofar as a large railway system is concerned. The difference which can probably be most easily taken into account has to do with weight. The record contains some discussion on this question, mostly theoretical in nature. Appellants seek to minimize the effect of weight on cost, but the record justifies the conclusion that weight is an important element in determining average unit costs. The testimony of appellants' witness Menaugh on this point is illuminating:

> It would cost more to haul a car containing fifty tons of freight than it would to haul a car containing only twenty tons if you are talking about the hauling of it strictly, but I won't agree with you if you are talking about the handling of it. If you refer to the

> hauling of it from A to B, I would say it costs more to haul it. (R. 1362.)

This confirms the general understanding that line-haul costs are dependent on weight. The extent to which average car-mile costs of individual railroads differ from each other because of differences in weight, length of haul, and other conditions affecting transportation is strikingly illustrated in the following statement comparing average car-mile operating costs which have been used by appellants in the studies upon which they rely in this case, together with certain other elements:

Railroad	Average car-mile cost	Average haul	Average loading	Percent of empty haul
	Cents	*Miles*	*Tons*	
Chesapeake & Ohio	7.51555	275	44	79
Cleveland, Cincinnati, Chicago & St. Louis	8.69541	182	29	64
Erie	8.83185	205	24	57
Chicago & Eastern Illinois	10.31614	169	27	51
Baltimore & Ohio	10.56372	190	31	62
Pennsylvania	10.95445	210	31	58
Chicago, Indianapolis & Louisville	12.76954	156	31	62

It will be noted that the highest cost shown above is approximately 70 percent greater than the lowest. It is unbelievable that the cost of hauling citrus fruit on the Chicago, Indianapolis & Louisville was 70 percent greater per mile than the corresponding figure for the Chesapeake & Ohio, yet that is what appellants' figures purport to show. The second highest cost, it will be observed, is that of the Pennsylvania. In 1929, the year on which appellants' cost studies are based, this carrier had

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the largest tonnage of citrus fruit of any railroad east of the Mississippi River and carried far more Florida citrus fruit than any of the other lines mentioned in the statement. It is highly improbable that the Pennsylvania's costs for citrus were ten percent above the average for the roads shown in the statement. The fact is, of course, that the variations shown are due to differences in average conditions which affect the average figures and have no bearing on costs of transporting citrus fruit. Some of these differences and their significance are clearly indicated in the above statement. The high cost shown for the Chicago, Indianapolis & Louisville is undoubtedly due to the fact that it has the shortest average haul and a fairly heavy average loading. The low cost of the Chesapeake & Ohio reflects its long average haul and large empty movement of coal cars returning to the mines, handled at relatively small expense, offsetting its unusually high average weight of loaded traffic. The Pennsylvania and the Baltimore & Ohio have higher average unit costs because their average hauls are shorter and also because they have a smaller empty movement. The figures for the Cleveland, Cincinnati, Chicago & St. Louis, the Erie, and the Chicago & Eastern Illinois are lower than those for the Baltimore & Ohio and the Pennsylvania presumably because of the former lines' lighter loading and in some instances larger empty movement. None of these average conditions

closely resemble those relating to citrus fruit, but undoubtedly they play an important part in determining the measure of the average car-mile operating cost, which is assumed to be the cost of citrus traffic.

The wide differences shown in the cost of handling traffic between the same points over different routes, according to the appellants' exhibits, confirm the belief that the average car-mile costs are dependent on conditions widely different from those affecting the transportation of a single commodity such as citrus fruit. For example Appellants Exhibit C–3 shows that the cost of hauling a carload of citrus fruit from Cincinnati, Ohio, to Buffalo, N. Y., is $106.34 over the Pennsylvania and $85.48 over the Erie. In other words, it costs the Pennsylvania about $21 more to handle the traffic than it does the Erie, if this theory is correct. This is not due to any difference in distance over the two routes, for in these exhibits the distances are assumed to be the same. It is due primarily to the fact that the average car-mile operating expense for the Erie is given as 8.83 cents and that of the Pennsylvania, 10.95. (R. 1328.) Since the average hauls for all traffic of the Erie and the Pennsylvania are approximately the same, it seems reasonable to infer that the reason for the difference lies in the fact that the average loading of all traffic for the Erie is 7 tons less than that of the Pennsylvania. The latter's superintendent of

freight transportation in the western region, Witness McSweeny, expressly disclaimed any information which might be helpful, saying (R. 1369):

> * * * mine is the practical job of getting the freight over the road. I am not in a position to say why it costs our company $25 a car more to haul a car of citrus fruit from Cincinnati to Buffalo than it does the Erie Railroad.

Chicago, Ill., affords another similar illustration. To this point the costs for the carriers north of the Ohio River are shown as follows:

Chesapeake & Ohio	$50.01
Chicago & Eastern Illinois	62.75
Baltimore & Ohio	67.18
Pennsylvania	71.85–74.66
Monon	77.00

Here a spread of $27 per car is shown between the lowest and highest. It is difficult to believe that they reflect differences in costs of hauling citrus fruit. They are undoubtedly due to differences in conditions affecting the average costs of all traffic which have nothing to do with citrus fruit. The Chesapeake & Ohio, as is well known, is predominantly a carrier of coal, on which it secures an unusually long average haul and which in turn is accompanied by a large empty movement. Both of these factors make for a relatively low car-mile transportation cost, and this circumstance no doubt explains the low cost of the Chesapeake & Ohio shown for citrus fruit. The divisions prescribed by the Commission allow the Chesapeake & Ohio $67

per car for its haul from Cincinnati to Chicago, approximately $17 per car profit, according to appellants' exhibits, which purport to show that $11 per car profit is sufficient to give it earnings of 5¾ percent on its investment (R. 258). Manifestly there is no confiscation so far as the Chesapeake & Ohio is concerned. The query then arises whether the Commission is legally bound to allow the Pennsylvania a higher division than $67 per car because its estimated costs under appellants' theory exceed those of the Chesapeake & Ohio by $21 per car. Such a showing of course proves nothing but the absurdity of attempting to measure costs of citrus traffic by system costs.

(e) Practical aspects of the appellants' car-mile theory demonstrate its unreliability and unworkability

Appellants concede that the usefulness of their cost theory depends on whether or not it supports a reasonable deduction as to the cost of transporting citrus fruit over their lines. We have previously pointed out some violations of fundamental principles of railway statistics which are involved in appellants' attempted approximation of costs in this case. We now wish to refer to some implications of the appellants' theory which are somewhat more practical in nature and which were largely responsible for the inability of the lower court to draw a reasonable deduction from the cost studies.

If the car-mile theory were sound, it would prove that the divisions which appellants were accepting prior to November 9, 1928, when this controversy arose, were confiscatory as a whole. It would also prove that many of the individual divisions which appellants insisted upon after that date were confiscatory. It was shown in the record before the lower court that the divisions fixed by the Commission would in the revenue-test period from November 9, 1928, to June 30, 1929, have yielded the appellants an increase of $62,835 over the amounts which they received from the former rates and divisions, being tantamount to an average increase of $2.15 per car. (R. 1491.) Figures for some of the more important individual points are of interest. The following table shows the estimated costs under appellants' theory, the revenue per car prior to November 9, 1928, since that date, and the average under the divisions prescribed by the Commission:

	Estimated cost	Revenue per car—		Prescribed by I. C. C.
		Prior to Nov. 9, 1928	Since Nov. 9, 1928	
Baltimore, Md	$36.85	$51.48	$57.89	$55.69
Philadelphia, Pa	60.08	55.44	62.79	61.67
New York, N. Y	83.69	66.60	75.14	76.07
Altoona, Pa	86.76	108.24	121.31	77.66
Pittsburgh, Pa	101.45	108.90	122.54	86.06
Buffalo, N. Y	135.48	113.56	127.25	109.41

From the foregoing table it will be noted that prior to November 9, 1928, appellants received for

the movement of Florida citrus from Richmond to New York $66.60 per car under a basis of divisions which had been in effect for about 18 years, except as affected by changes in the general rate level. On the date mentioned appellants increased that division to $75.14 per car, and in the proceedings before the Commission they asked merely that this division together with the other divisions they were then exacting be allowed to stand for the time being. Under the Commission's findings there would have been an increase in this division to $76.07 per car, which applied to the principal movement that appellants stress as being very expensive. Now because of reductions in divisions which appellants were exacting to points other than New York they contend that the New York division must be $83.69 per car in order to prevent confiscation, or $8.55 per car more than the amount which they asked the Commission not to disturb. It will be noted from the above table also that the divisions to Philadelphia and Buffalo prior to November 9, failed to return costs under appellants' theory, and the same was true of the divisions to Buffalo exacted by appellants after that date. In the hearings before the Commission, appellants declined to express a final opinion whether the divisions they were then exacting in settlements were reasonable, but at that time they were asking no increases in those divisions.

Appellants' witness Kentifield testified before the Commission that about 17 years ago appellants

became dissatisfied with their divisions of rates with the southern lines on a number of commodities, including citrus fruit. (R. 564–5.) However, in such illustrations of this dissatisfaction as are referred to in the record no specific mention of citrus fruit appears. In 1921 the northern lines wrote to the Commission, asking for an expression of opinion concerning the general subject of their southern divisions. The chairman of the Commission replied, stating that the Commission was not disposed to consider informally the question of these divisions, and that if the northern lines were not satisfied with existing divisions, they should bring the matter to the attention of the Commission in a formal proceeding. (R. 565.) In view of the fact that at that time the Commission had complete jurisdiction to adjust these divisions, it is obvious that no other reply could logically have been made to the northern lines. These lines did nothing further about their dissatisfaction, however, for 9 years. In the latter part of 1930 they filed a petition, asking the Commission to institute a general investigation into divisions of class rates and rates related to such class rates. Pending the conclusion of that investigation, appellants earnestly opposed any change in the citrus divisions, even though some of those divisions, as increased by their own action November 9, 1928, would be confiscatory under the theory of costs which they urge here.

In the same connection it is pertinent to refer to the divisions received by appellants from rates on citrus fruit from California to eastern points. While the Commission did not find the California divisions helpful as a basis of comparison in considering the reasonableness of the Florida divisions, these California divisions are significant for the light which they throw on the practical value of appellants' car-mile cost theory in determination of the issue of confiscation. At the time of the hearing in May, 1931, it appeared that the Pennsylvania Railroad participated in the movement from California, receiving divisions yielding it $92.09 per car for its haul from Chicago to Buffalo, 673 miles, and the same for a movement to Pittsburgh, 468 miles. (App. A.) Appellants now assert that the transportation costs and taxes for a carload of Florida citrus from Richmond to Buffalo, 550 miles, are $135.48 and from Richmond to Pittsburgh, 416 miles, are $101.45. (R. 1622J.) In other words, the Pennsylvania argues that merely to cover operating expenses and taxes for the haul from Richmond to Pittsburgh it must have $9.36 per car more than it receives for a haul 52 miles longer from Chicago to the same point. Likewise for the haul from Richmond to Buffalo it claims $43.39 per car more than it gets for a haul 123 miles greater from Chicago.

The lower court rightfully attached significance to the level of the divisions voluntarily accepted by

appellants on California and Florida citrus. Concerning the California divisions it said (R. 258):

> The willingness of the northern lines to accept the prevailing divisions on California citrus fruit is not without significance. * * * and it appears that if the expenses on California fruit are determined on the car mile basis, these roads suffer even larger deficits in this respect than those of which they complain in the pending case.

As to the level of the former Florida divisions, the court expressed somewhat similar views, as follows (R. 259–260):

> It is most persuasive to us that the expert opinion offered by the northern lines conflicts with the actual practice they have pursued, for although other considerations than profit may have induced them to accept the divisions in effect after November 9, 1928, it is difficult to believe that they would have acquiesced in divisions actually confiscatory. A calculation derived from the exhibits filed by the petitioners shows that such was the effect of the divisions which the Pennsylvania Railroad received, if the car-mile cost basis may be properly used. On that basis, the total combined expenses of the Pennsylvania Railroad and the Richmond, Fredericksburg and Potomac on 14,573 cars moving to trunk-line territory in 1928–1929, as calculated by the petitioners, was $1,160,756.28. The corresponding divisions which these roads exacted as collecting car-

riers amounted to $1,161,028.69; so that a combined net revenue of only $272.41 was produced. We have not been able to segregate the revenues of the two roads from the exhibits in the record, but it shows that the divisional agreement between these carriers has been in effect for many years. Under the divisions prescribed by the Commission in this case, the Pennsylvania suffered a loss according to the petitioners' calculations on car-mile basis of over $65,000, and the Richmond, Fredericksburg & Potomac a loss of only $1,259. The fair inference is that if the same plan of divisions between the two named carriers was applied, the divisions between the Northern and southern lines as settled would have produced a substantial loss to the Pennsylvania, and a considerably larger income to the Richmond, Fredericksburg and Potomac than the sum of $272.41. A similar computation for movements over the Baltimore & Ohio and the Richmond, Fredericksburg & Potomac shows that they together realized a net income of $34,623.03 under the divisions as settled, if the car-mile basis were applied. The net revenue to the three roads combined would be $34,895.44. It follows, that the divisions, as settled, were themselves confiscatory on the car-mile basis, at least as to the Pennsylvania, and also as to the three roads combined under the group confiscation theory of the petitioners. When this weighty consideration affecting the stronger northern lines, and especially the one enjoying the largest revenues from the

> traffic, is thrown into the scale, the conclusion we have reached upon the main proposition of the petitioners is confirmed. (R. 259–260.)

In thus viewing appellants' evidence as to confiscation realistically it seems not improbable that the lower court had in mind observations of somewhat similar import which this court has had occasion to make in recent decisions involving confiscation concerning "evidence which proves too much." *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151. The following quotation from *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U. S. 290, 312, is also highly apposite here:

> Men do not transact business without protest at confiscatory rates, at all events in the absence of extraordinary circumstances making submission to the loss expedient.

There are shown here no "extraordinary circumstances making submission to the loss expedient." Appellants state a number of reasons, which for a decade or more had caused them to feel that their citrus divisions might properly be increased, but for the most part this mental state did not manifest itself objectively. In 1920 the Commission was fully empowered to prescribe divisions through enactment of the statutory provisions governing this subject now in effect. It might naturally have been expected that the northern lines would take advantage of these new amendments to the Interstate Commerce Act to secure the relief to which they

considered themselves entitled. Instead they merely asked the advice of the Commission as to how the revenue from the interterritorial rates should be apportioned. When the Commission replied that it could not answer such a question informally and suggested that a formal proceeding be instituted, (R. 564–5) the northern lines ignored the suggestion.

A practical difficulty which renders appellants' car-mile cost theory unreliable and in fact unworkable in judging divisions, either from the standpoint of confiscation or reasonableness, is caused by its inapplicability to joint-line hauls. Appellants have applied the theory to movements which require only single-line hauls north of the territorial gateways and two-line hauls, including the Richmond, Fredericksburg & Potomac as one carrier. The reasons for limiting the practical application of the theory in this way were clearly and candidly set forth by appellants' witness Hodkinson, as follows (R. 1251–2):

> I made these classifications for this purpose: We are comparing the estimated expense per car on the car mile unit with the revenue that we obtained per car from the Commission's prescribed divisions, but we are confining that comparison to single line hauls for this reason, that I believe that it is only possible to compute an average expense of handling a car one mile when you confine that comparison to one railroad except under

somewhat unusual circumstances such as the R., F. & P. If you take page two, for example, to ascertain the cost of handling a car from Richmond, Virginia, to Boston for Boston & Albany delivery, I would have to determine the average per car mile unit for each of those lines and then the total per car expense for each of those lines and then add the results for each of the lines all together. That would give me a figure which I believe would be greatly inflated because of the terminal situation.

In connection with the shipment which the road originates and delivers, there are two terminals entering into the picture, the origin and the destination. In connection with a shipment received from a connecting line and delivered by another line there are not exactly two terminals. You have an interchange expense which generally, but not always, is less than the terminal expense. On the shipment where a road acts as the bridge carrier, that is it neither originates nor delivers the shipment, its function is purely that of an overhead carrier, you don't have any real terminal at all; you simply have two transfers. So that using the average expense, the terminal factor is much more manifest and is much more reflected than it would be on an overhead shipment, if we apply those average expenses for each of the lines you would be putting too much emphasis on the terminal factor and the total car mile expense that you would obtain would be inflated.

Of the 27,048 cars of Florida citrus fruit which moved via the Richmond gateway to destinations in trunk-line territory and New England, 17,324 went to points on the Baltimore & Ohio and the Pennsylvania and are included in appellants' cost study. The remaining 9,724 (36 percent of the total), moved over additional lines, and as to these the appellants' cost theory is unsuitable and inadequate, as their principal admits. Therefore, even if full weight be given their cost theory, it must be discarded before costs on two-thirds of the total number of shipments have been computed. On brief appellants endeavor to get around this obstacle with the following statement:

> In their evidence in this case, the Northern lines showed confiscation with respect to each division on single-line traffic. This is the evidence "typical in character and ample in quantity" upon which they rely to show confiscation, not only with respect to the specific divisions considered, but also the divisions applicable to joint-line hauls. Certainly, if as this record convincingly shows, the single-line divisions are confiscatory, those applying on competitive, joint, or multiple-line hauls are more expensive than single-line hauls.

The cost evidence offered by appellants concerning single-line traffic is not typical of the costs on the joint-line hauls, as the quoted testimony of their own cost witness clearly shows. That evidence affords no reasonable deduction as to the cost of the

traffic to New England moving over the Boston & Albany, using the example cited by that witness. This question does not relate to costs over single-line routes in comparison with those over multiple-line routes to a common or competitive point, as appellants indicate on brief. It relates to situations in which the transportation is necessarily over multiple-line routes.

The joint-line hauls referred to above include those over the Boston & Maine, the New York Central, Pittsburgh and Lake Erie, the New York, New Haven & Hartford, the Central Railroad Company of New Jersey, the Reading, the Lehigh Valley, the Delaware, Lackawanna & Western, the Delaware & Hudson, and the Pere Marquette. These railroads are intervening petitioners and subscribe to the "group confiscation" theory. The record is devoid of evidence as to their costs on an average car-mile theory or any other. There is no evidence whatever to indicate that the evidence as to average costs of the Baltimore & Ohio and the Pennsylvania is typical of the other roads above named. (R. 1336.) We have previously pointed out that as to the Erie, the Chesapeake & Ohio, and the Cleveland, Cincinnati, Chicago & St. Louis the evidence as to average costs of the Pennsylvania and the Baltimore & Ohio is not typical, for the average cost for the two lines last named in 1929 was 28 percent greater than the average for the other three. Hence it may not be assumed that the aver-

ages for the Pennsylvania and the Baltimore & Ohio are typical of the costs of any other line.

The fundamentally inherent fallacy in any attempt to determine, by such use of computed "system average" costs, the expense to a railroad of transporting a particular commodity or article of traffic—especially when, as here, the movement utilizes only a small portion of the total mileage of great railroad systems—has been pointed out and emphasized repeatedly by both the courts and the Commission. In one form or another this theory has been urged before the Commission and rejected as fallacious on many occasions in the past. Whenever shippers have urged the theory in efforts to secure reduced rates, the railroads have exposed its fallacies. One such notable proceeding came before the Commission as long ago as 1916, reported as *Iron Ore Rate Cases,* 41 I. C. C. 181. Those cases involved an attack on rates on iron ore from Lake Erie ports to steel-manufacturing districts in Ohio, Pennsylvania, and certain adjoining States. One of the complainants therein submitted a cost study based on the assumption that the average costs of handling all freight traffic were the same as those for iron ore. It is worthy of note that in this study there was a separation of the road-haul and terminal elements and to that extent the cost study was superior to the one with which we are here dealing. However, the road-haul cost used in the study represented merely the average cost on all freight. The Commission said:

> It is therefore clearly manifest that the method does not produce any distinctive characteristic as to the cost of transporting iron ore nor does it indicate what would be a reasonable charge for such transportation. The application of the method to all commodities would result in fixing a common charge per car for all freight handled in carloads for equal distances and would also eliminate the necessity for a classification of carload freight.

The Commission rejected this study, which is analyzed at length on pages 274–281 of the appendix to the report. That analysis effectively shows the transparency of the theory underlying the study and quotes from criticisms of it voiced by the defendant railroads, including the Pennsylvania and the Baltimore & Ohio. Among the particular grounds of the defendant carriers' criticisms in that case, the following appear in the Commission's report (p. 281):

> In addition to criticisms of the separation of operating expenses between freight and passenger services and the apportionment of freight expenses to the road-haul, terminal, and other services, the carriers offered other criticisms, some of which were
>
> "That the method is in no sense a 'cost' study, but merely a reapportionment of the total freight revenue of the carriers between iron ore and all other freight;
>
> * * * * *

"That the method makes no provision for intermediate terminal and switching services when two or more lines are involved in the haul;

"That the method assumes the terminal costs to be the same for an empty as for a loaded car;

"That the method assumes that the percentage of empty haul for iron ore is the same as for all traffic;

"That the units or factors obtained by taking the entire operations of a railroad would not reflect the costs of transporting iron ore over a particular division of that road, although the method assumes that the operating conditions are the same on all divisions."

There have been many other subsequent cases in which the Commission has declined to accept the contention that average costs for all traffic afford a safe guide in the determination of the cost of handling individual commodities. Only a few will be mentioned: *Republic Iron & Steel Co.* v. *B. & O. R. R. Co.*, 83 I. C. C. 429; *Brier Hill Steel Co.* v. *B. & O. R. R. Co.*, id. 709; *California Growers & Shippers' Protective League* v. *S. P. Co.*, 129 I. C. C. 25, 52; *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, 183.

A recent case in which the Commission has dealt with this question, however, requires more than passing mention. It is *R. W. Burch, Inc.* v. *Railway Express Agency*, 190 I. C. C. 520, 197 I. C. C.

85. That case arose on complaint assailing the express rates on strawberries from Florida to northern destinations. As the express transportation service on that traffic was performed in passenger trains, defendants submitted a cost study in which it was assumed that the average operating expense per passenger-train car-mile represented the average expense per car-mile incurred in handling an express refrigerator car. This study purported to show that the rates in issue afforded revenue only slightly more and in some instances substantially less than the cost of service as computed in this study, and defendants accordingly argued that the rates assailed could not be found unreasonable. Division 5 of the Commission, which decided the case in the first instance, rejected this cost study and prescribed reductions in the rates. In referring to the study, division 5 said:

> An outstanding defect in the study is that there is no separation of line-haul and terminal costs, the amount of each being reduced to an average per passenger-train car-mile, thus including the terminal as well as the line-haul factor in the average car-mile cost. A terminal factor is a constant, independent of and unaffected by the distance a car is handled, whereas a line-haul factor is so affected and therefore a variable quantity. The effect of including both factors in the average car-mile cost and applying the latter to hauls of various distances is to make equally variable and thus pyramid the ter-

> minal factor. * * *. The evident result is an excessive estimate of these costs, in an undeterminable degree, including those of intermediate carriers in the through movements which perform no terminal service at all. The study also questionably assumes that it costs as much to haul an empty car as a loaded one, and that system car-mile cost is representative of the cost on the main lines of heavy density, or relatively heavy-density traffic over which this strawberry traffic principally moves. Without considering other defects and evidently doubtful assumptions, we conclude that the study can not be accepted as definitely supporting the assailed express rates.

Upon reargument the entire Commission prescribed lower rates for the future than those fixed by division 5, after reexamining the cost study and concluding that it could not be accepted as supporting the rates prescribed by the division. The defendants in that proceeding applied to the United States district court for southern New York for an order setting aside the Commission's findings and order but were unsuccessful, *Railway Express Agency* v. *United States,* 6 F. Supp. 249. The following excerpts from the court's opinion are of interest:

> It was entirely within the competency of the Commission to reject this evidence as it has done. Whether a fact finding body believes a witness or not is its own concern.

> Indeed, it seems to us that the Commission's challenge of these costs is entirely supportable. For it would be almost impossible accurately to show by such cost schedules what the actual cost of carrying a particular commodity was when that commodity was but one of thousands of different kinds of commodities carried by the railroads. Consequently, it would be almost, if not quite impossible, to establish that a rate on any individual commodity was confiscatory.
>
> To attempt to show that the rate prescribed for the carriage of a single one of many thousand commodities is confiscatory or indeed unreasonable is inherently very much more difficult than to make such showing in respect of the rate prescribed for a homogeneous service, such as that furnished by a city traction line or by an electric public utility.

In no case has this fallacy been more clearly shown than in *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S. 39, 69 L. ed. 836; cited and followed in *C. M. & St. P. Ry. Co.* v. *Public Utilities Com.,* 274 U. S. 344, 71 L. ed. 1085. Both cases relate to orders of state commissions reducing rates for the transportation of saw mill logs—in the one case in the State of Washington, and in the other in Idaho.

In the *Northern Pacific case* certain railroads operating in the State of Washington had attacked an order of the Department of Public Works re-

ducing log rates, the grounds of the attack being (1) that the Department's findings were arbitrary and unsupported by the evidence; and (2) that the prescribed rates were confiscatory. This Court pointed out that the railroads had introduced evidence before the Department which tended to show that their existing log rates were so low as not to defray fully the operating costs and taxes; that little attempt had been made by shippers, the public or anyone else to prove that the railroads' evidence was "inherently untrustworthy" or was overcome by "more persuasive evidence to the contrary"; that the Department's findings concerning operating costs "rested largely upon deductions from data found in published reports of the carriers and in their exhibits filed in this case"; and the court further said:

> Instead of attempting to show by evidence, reasonably specific and direct, what the actual operating cost of this traffic was to the several carriers, the Department created a composite figure representing the weighted average operating cost per 1,000 gross ton miles of all revenue freight carried on the four systems, and made that figure a basis for estimating the operating cost of the log traffic in Washington. This was clearly erroneous.

The court then set forth and enumerated the various reasons why any such use of "system average" unit costs of a railroad for computing the cost

of carrying a single commodity, out of the many thousands of commodities which the railroads carry, is fundamentally erroneous, and stated:

> The use of this factor in computing the operating costs of the log traffic *vitiated the whole process of reasoning by which the Department reached its conclusion.* [Italics supplied.]

The court accordingly held:

> An order based upon a finding made without evidence (*Chicago Junction Case, Baltimore & O. R. Co.* v. *United States,* 264 U. S. 258, 263, 68 L. ed. 667, 673, 44 Sup. Ct. Rep. 317), or upon a finding made upon evidence which clearly does not support it, (*Interstate Commerce Commission* v. *Union P. R. Co.,* 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108), is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process.

At page 44 of the opinion, this Court said:

> * * * In this unit cost figure no account is taken of the differences in unit cost dependent, among other things, upon differences in the length of haul; in the character of the commodity; in the configuration of the country; in the density of the traffic; in the daily loaded car movement; in the extent of the empty car movement; in the nature of the equipment employed; in the extent to which the equipment is used; in the expenditures required for its maintenance. Main

> line and branch line freight, interstate and intrastate, carload and less than carload, are counted alike. The Department's error was fundamental in its nature. * * *.

In this connection, the testimony of Mr. Menaugh, a witness on behalf of petitioners, in the court below, is significant. He said:

> * * * the car mile method does not take into consideration or make any allowance for difference in the character of the commodity hauled over the system. It does not take into consideration the difference in the type or topography, mountains, or flat country, over which the railroad's traffic is hauled, nor the density of traffic, nor the daily loaded car movement, the extent of the empty car movement, the nature of the equipment involved and does [not][11] count empty cars the same as loaded cars. We do in calculating the operating cost of the citrus fruit traffic take into consideration the nature of the equipment, whether railroad owned cars or privately owned cars. The car mile method counts the main line and branch line traffic alike, just the same as gross ton mile; all traffic hauled at intrastate rates and interstate rates, all averaged, and carload and less than carload counted alike.
>
> I am not prepared to say how much greater the expense of handling perishables, including citrus fruit, is over the expense of

[11] A stipulation on file with the Clerk shows the word *not* was erroneously included in the transcript. (R. 1634.)

> handling ordinary traffic. I don't know whether it might be fifty cents a car or might be five dollars a car, of my own knowledge. (R. 1363.)

In the *Idaho case, C. M. & St. P. Ry. Co.* v. *Public Utilities Commission,* the court, citing and following the *Northern Pacific case,* held upon similar grounds that the state commission's order was a denial of due process because that commission had ignored the railroads' evidence and reduced the log rates, upon consideration solely of the interstate lumber rates and the intrastate log rates together, and certain action which the Interstate Commerce Commission had taken with respect to the interstate rates.

The *Northern Pacific case,* in particular, furnishes a most direct and persuasive authority supporting the Commission's refusal to rely upon the appellants' cost calculations and its denial of their second petition for rehearing. The Department's fundamental error, which the court found "vitiated the whole process of reasoning by which the Department reached its conclusion," is the same fundamental error which inheres in appellants' cost calculations set forth in their petition before the Commission, namely, the use of "system average" unit costs to compute the cost to a railroad of carrying an individual commodity or article of traffic.

In *Wood* v. *Vandalia R. Co.,* 231 U. S. 1, 58 L. ed. 97, this Court said, at page 5:

> It is plain, however, that it does not follow from the mere fact that the total operating expenses of a railroad, or of a division of a railroad, bear a given relation to the entire receipts of that road or division, that the cost of transportation in the case of a particular class of traffic bears the same relation to the revenue derived from that class. The ratio, in the first case, is found by bringing together a great variety of operations involving various rates and different outlays for different sorts of traffic. It is predicated on the whole volume of business considered as such, and may be far from true of some part of it considered separately. It does not purport to be an expression of the relative cost of any specified part, but simply of that of the entire traffic to which it applies.
>
> How hazardous may be the use of such a ratio to determine the relative cost of a fragment of the business is apparent in this case.

The foregoing comments of the Commission and the New York District Court on the cost evidence in the *Burch case* (*ante*, p. 84) are of particular interest because of the fact that appellants' cost study in the case at bar is admittedly modelled after the one in that case. (R. 1229.) Appellants say that they have remedied the defects pointed out by the Commission in the first report in the *Burch case*, but such variations as they have made are not of fundamental importance. They have undertaken to meet the criticism of pyramiding the

terminal factor by making a separate showing for the R. F. & P. (R. 1619–1620), but this modification does not avoid the difficulty, since it merely goes to the question of the use of costs for intermediate carriers. The fact remains that the study makes no segregation of terminal and line-haul costs, and for the Pennsylvania, for example, in 1929 the terminal expenses appear to have been about 46 percent of the total.

To point out the distinguishing circumstances which surround the particular movement of citrus fruit to which the studies are limited—all of which differentiate that traffic and its movement from the average of all traffic on appellants' respective systems as a whole, including both main lines and branch lines, and condemn the use of "system average" expenses for computing a unit cost of transporting the citrus fruit traffic: (R. 183–187.)

> (a) That both the Pennsylvania and the B. & O. are large systems (the Pennsylvania System, for example, embracing over 10,000 miles of railroad) which are made up in part of main lines of heavy traffic density and in part of numerous branch lines, on which latter the traffic is relatively light and operating costs per unit of traffic are relatively high (R. 1273, Knight Ex. No. K–5, R. 1517–1518);
>
> (b) That the citrus fruit movement included in appellants' cost studies utilizes only a very small portion of the total system mileage—to New York, for example, only

about 2 per cent of the Pennsylvania system mileage and to Buffalo only about 4 per cent; and even including the total mileage of all of the lines used for the entire movement of 17,324 cars, less than 15 per cent of the system mileage in the case of either the Pennsylvania or the B. & O. (R. 1421–1422); (Knight Ex. Nos. K–5, 6 and 7; and K–Nos. 5–A, 6–A and 7–A);

(c) That a considerable portion of the citrus fruit included in appellants' studies goes to a limited number of large cities, the entire movement north of Potomac Yard being over main lines of the Pennsylvania or B. & O., involving no branch line hauls at all (Hodkinson Ex. No. 10; R. 511–512);

(d) That by far the largest proportion of the total movement goes to such points as New York, Philadelphia and Baltimore—for example, to New York City alone 11,358 cars out of a total of 24,123 cars handled by the Pennsylvania (R. 54–55);

(e) That of the total movement of about 29,000 cars out of Potomac Yard in 1928–29, the Pennsylvania handled all except about 4,500 cars, which latter moved out via the B. & O. (R. 54–55);

(f) That in 1929 there were moved into Potomac Yard from the south a total of more than 107,000 cars of citrus fruit and other perishable traffic, such as peaches, watermelons, etc. (R. 1361); throughout the greater portion of the entire year, including the citrus fruit shipping season, this movement of citrus fruit and other perishables is

in regular and daily volume sufficient to enable the operation of solid trains of such perishables out of Potomac Yard (Doss Ex. No. 3; R. 1496); during the height of the citrus-shipping season in 1928–29 the Pennsylvania seldom received at Potomac Yard less than 50 cars per day of citrus fruit alone, and frequently as many as 200 cars (R. 58); the Pennsylvania operates such solid trains of perishables whenever the volume of the traffic justifies (R. 1361); shipments destined to New York are consolidated by the Pennsylvania into individual trains at Potomac Yard (R. 1361); and during the height of the citrus shipping season the Pennsylvania operates daily at least one, and generally two solid trains of citrus fruit and other perishables directly from Potomac Yard to its terminals at Jersey City, for New York delivery (R. 58; 1361; Tassin Ex. No. 11; R. 1478);

(g) That as shown by an actual check of the records of all trains during the period of the citrus movement, November 8, 1928, to June 30, 1929, or 234 days, the Pennsylvania's trains out of Potomac Yard which consisted 50 per cent or more of cars loaded with perishables, averaged 60.68 cars per train and 2,812 "adjusted" gross tons per train; that all of its trains out of Potomac Yard averaged 62.22 cars per train and 2,723 "adjusted" gross tons per train; that these trains out of Potomac Yard exceeded both in number of cars and "adjusted" gross tonnage per train the averages for the Penn-

sylvania System as a whole, which latter were 56 cars per train and 2,362 flat gross tons per train (Tassin Ex. No. 11; R. 1477);

(h) That the citrus fruit included in appellants' studies moves over lines of heavy traffic density as contrasted with other portions of appellants' respective systems, or with such systems as a whole; that taking all lines of the Pennsylvania or B. & O. over which the citrus fruit covered by the cost studies actually moved (representing in the aggregate less than 15 percent of the system mileage in each instance) the freight traffic density on said lines bears approximately the following ratio to the density for the balance of the system—B. & O. 352 percent; Pennsylvania 365 percent; while the passenger traffic density bears approximately the following ratio—B. & O. 550 percent; Pennsylvania 558 percent. Taking the Pennsylvania's line between Potomac Yard and Jersey City (over which approximately two-thirds of the total of 24,123 cars handled by the Pennsylvania moved the entire distance of 239 miles) the freight traffic density over this line is about four times greater than for the balance of the system, and the passenger traffic density is at least eight times as great as for the system as a whole (Knight Exs. Nos. K–5, K–6, K–7 and K–5–A, K–6–A and K–7–A, (R. 1516–1519):

(i) That the effect of the heavy freight traffic density on the lines of the Pennsylvania and Baltimore & Ohio over which the citrus fruit actually moves, as contrasted

with the traffic density of other portions of the respective systems, or with such systems as a whole, is to reduce the operating expense per unit of traffic on the first named lines as compared with the respective systems, for the reason that a large proportion of the operating expenses—(1) about two-thirds of Maintenance of Way and Structure expense; (2) 43 percent of Maintenance of Equipment expense; and (3) a very substantial portion of Transportation expense—remains constant and unaffected by use or volume of traffic, the result being that as the volume, or number of units, of traffic increases the cost per unit of traffic is reduced (R. 1522);

(j) That the relatively heavy passenger traffic density on the above-mentioned lines over which the citrus fruit actually moves, as contrasted with the passenger traffic density for the respective Pennsylvania and Baltimore & Ohio systems as a whole, has the effect of further reducing the relative freight unit costs of operation over the first-named portions of the systems, for the reasons:

(1) A large percentage of operating expenses incurred are for the joint benefit of both freight and passenger services—on the Seaboard Air Line Railway, for example, nearly one-half of all operating expenses in 1933 were common to both freight and passenger services;

(2) A high passenger traffic density results in a larger spread for common ex-

penses, thereby further lowering freight unit costs (R. 1527–1533; Knight Ex. Nos. K–8 and K–9);

(k) That there is no suggestion in this record that the plants of such roads as the Pennsylvania or other appellants are inadequate to enable them to handle efficiency and expeditiously the volume of traffic offered, regardless of how great such volume may be, or that there is any shortage for such purpose of either necessary main line and other track facilities, equipment, or terminals; nor is there any suggestion that even in 1929 these facilities had in any way reached a "saturation" point from the standpoint of volume of traffic; the necessary result being that the greater the volume of traffic the lower is the operating cost per unit of such traffic. In the year 1929, comparing the four southern roads, as a whole, with the seven eastern roads, as a whole, which principally participate in the citrus fruit movement, the number of traffic units per $1,000 of investment for the eastern roads exceeded the corresponding figure for the southern roads by approximately 68 per cent. (R. 1547.)

All of the foregoing facts destroy, as found by the District Court (R. 259), the value of the underlying assumption upon which appellants' cost studies are grounded, namely, that the average loaded and empty car mile cost to appellants of transporting all traffic over appellants' respective

systems as a whole, can be used as a proper measure of the average cost of transporting the citrus fruit which is covered by the cost studies.

It is unnecessary to discuss in detail the applicability of appellants' average car-mile cost theory to the southern lines, for which appellants submit detailed figures. The criticisms which we have set forth demonstrate the unsuitability of the theory for any purpose. Possibly the theory is somewhat less wide of the mark as to the southern lines, since their average weight per car for all traffic is much nearer the weight of citrus fruit. The average carload weight of carload traffic of the three Florida lines is in the neighborhood of 25 tons, compared with 38 tons for the Pennsylvania. Also, as we have shown, citrus fruit constitutes a much larger proportion of total traffic of the Florida lines than it does in respect of the total traffic of the northern lines. Aside from the unsoundness of the appellants' cost theory, the purported costs of the southern lines are not relevant to the issue of confiscation raised by appellants. (R. 261.)

The computation for the southern lines has been performed for the apparent purpose of supporting the northern lines' contention that the findings of the Commission are too liberal to the southern railroads. At no time during the hearings before the Commission did the northern lines urge that average car-mile costs should be used in determining citrus divisions. Nor did they advance the

contention in their first petition for reconsideration. It was brought forth for the first time in their second petition for rehearing in which the car-mile cost formula was used as the basis of their allegation of confiscation.

Some of the results of the formula in determining the costs of the southern lines are so astonishing that they deserve special mention. It purports to show, for instance, that the Atlantic Coast Line's operating cost per car mile is 22 percent less than that of the Pennsylvania, and that, including also taxes and return on investment, a mile of transportation over the latter is worth 1.21 miles over the former. The only possible conclusion from the formula is that general transportation is less costly in the South than in the North, but this conclusion is contrary to the view frequently expressed by the Commission.

It is safe to say that in the litigation of recent years before the Commission no question has been more vigorously controverted than that of comparative transportation costs in the North and in the South. Voluminous evidence on the subject has been offered, but none of it has impressed the Commission as warranting any definite conclusions as to comparative costs. The Commission alluded to this at page 757 of its first report in this case as follows:

> The statistical evidence before us supports the view we have expressed in other proceed-

> ings that transportation costs are generally higher in the southern than in the eastern group, but the ton-mile statistics bearing on this problem in the present record are not essentially different from those in other cases where we have declined to express a definite opinion on comparative transportation costs in the two territories because of differences in average hauls and other factors, *Hosiery from Southern Points,* 156 I. C. C. 117, 123. (R. 72–73.)

In the litigation concerning interterritorial rates (as distinguished from divisions) between the North and the South the northern railroad lines, who are the appellants here, have consistently taken the position that the rates between the two territories should normally be higher than those within the North on the same traffic to reflect the less favorable transportation conditions affecting that portion of the haul within the South. As an example illustrating this position see *Blue Ridge Glass Corp. v. Akron & B. B. R. Co.,* 176 I. C. C. 449, 454. This view has received the approval of the Commission, a recent expression to that effect being the following statement in a report on reconsideration in the case above cited, 201 I. C. C. 421, 428, dated June 4, 1934:

> It is well recognized that transportation conditions as a whole are more favorable in official territory than the southern territory. For that reason higher rates may properly be maintained for interterritorial move-

> ments between the two territories than for local movements within official territory.

Since the northern lines now come forward with a cost study which purports to show that the Southern Railway, the largest individual carrier operating within the South, can profitably perform transportation at a cost 10 percent lower mile for mile than the Pennsylvania Railroad, the outstanding northern line, it will readily be seen that acceptance of any such conclusion would have momentous consequences on the rate structure.

As a further example of the fallacious theories of transportation costs on which appellants rely, the following allegation in paragraph XX of their original petition deserves notice:

> Petitioners allege * * * that the said prescribed divisional factors for equal hauls north and south of the interchange gateways which are 85 per cent higher for the southern lines than for the northern lines (dissenting opinion, p. 761, Ex. B), or which evaluate a mile of transportation in the South as being worth as much as 1.77 of a mile of transportation service in the North (p. 377, Ex. C), are not only not supported by law, but are unsupported by and contrary to the primary and evidentiary facts established by the record and found by the Commission; (R. 20).

The criticism that the statement above quoted is "not supported by law" is meaningless, for any comparison of transportation costs or of worth or

value of a mile of transportation in the north and the south in the nature of things is not a question of law in any sense of the word but purely a question of fact.

The divisional factors prescribed by the Commission were in the form of a mileage scale, progressing in blocks of 20 or 25 miles. It is of course possible to divide these factors by the number of miles which they respectively cover in order to secure a figure per mile, for any given distance, and that figure is dependent on the progression or curve of the scale, expressed graphically. The relation between the figure per mile in one territory and in the other will therefore depend necessarily on the length of haul in each territory. At one time appellants insisted that under the Commission's findings a mile in the South was evaluated as worth two in the North (R. 81–82), but they no longer press that absurdity. Instead they refer to a statement in the dissenting expression attached to the first report as follows:

> 1. For a haul of 600 miles, the northern prorating factor is 87, and the southern prorating factor is 161. The southern factor is 85 percent higher than the northern factor. (R. 77.)

The mere circumstance that this sentence is contained only in the dissenting expression indicates that it is one to which the majority of the Commission did not subscribe, and their reasons for not

doing so are clearly indicated in the second report where the fallacy of the extreme 2-for-1 ratio, which appellants at one time advanced, is exposed. (R. 82.) It was there pointed out that for practical reasons there could be no movement of Florida citrus fruit from a point 600 miles south of the dividing line to a point 600 miles north thereof. Hence the 85 percent figure is without significance. It was further pointed out on the page above referred to that the southern hauls considerably exceed 600 miles and for the most part the northern hauls are considerably less, even though a movement of 700 miles in both territories would be possible, although infrequent. It was there shown that the ratio for such a haul would be 1:1.77, a purely fortuitous relationship. These figures demonstrate the important influence of length of haul on any such comparison as this, again showing the unreliability of any sort of showing expressed in terms of a given quantity per mile.

To summarize and conclude on this point: The system average cost per total car-mile, loaded and empty, for all freight, is not a service cost unit that is commonly used in studies to approximately determine the cost per loaded car for transporting a particular commodity. The car-mile is a unit of line haul service and not of terminal service. The system average cost per total car-mile is here obtained by dividing the freight proportion of operating expenses, taxes, and interest on investment,

for all freight, (all freight here embracing revenue and non-revenue, carload and less-than-carload freight, and the expense items above embracing the terminal as well as the line-haul proportion of these items), by the total loaded and empty car-miles of line haul service. This results in what may be termed a nondescript car-mile cost figure. It is not a service cost unit that is representative of the cost of transporting either a loaded or an empty car, because it is based upon the inclusion of the car-miles of both in the divisor. It is not representative for carload, less-than-carload, revenue, or non-revenue freight, because it embraces them all. It is not representative for any commodity, because it includes them all and in addition less-than-carload and non-revenue freight. It is not representative for citrus fruit, because in addition to the citrus fruit here involved it includes all fruits and vegetables, products of agriculture, animals and products, products of mines, products of forests, manufactures and miscellaneous, and also less-than-carload and non-revenue freight. It is not representative of either line haul or terminal costs, because it includes them both. It is not representative of the car-mile cost on any particular line of the system over which the citrus fruit in question moves, but is merely an average car-mile cost for all freight traffic transported on all parts of the system, for whatever it may be worth, without distinction between loaded and empty cars, between

heavily loaded or lightly loaded cars, between revenue and non-revenue and between carload and less-than-carload freight, between line and terminal, and between main lines and branch lines.

The system average cost per total car-mile, loaded and empty, for all freight, revenue and nonrevenue, carload and less-than-carload, is not a proper service cost unit to apply to both the loaded and the empty car-miles for citrus fruit to approximately determine the cost of transporting that commodity, and it does not in consequence result in a reliable ascertainment of that cost.

III. The Commission did not act arbitrarily in any respect in issuing the order, nor did it give undue weight to the relative financial needs of the several carriers

Concerning the legal effect of a finding by the Commission as to what is just and reasonable this Court in *Virginian Ry Co.* v. *U. S.*, 272 U. S. 658, 665–666 said:

> The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal "informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.

The Court has likewise made it clear that in a case concerning divisions, such as the one at bar, it will

not consider the weight of the evidence, or the wisdom of the order entered. *New England Divisions Case,* 261 U. S. 184, 204.

In *Terminal R. R. Assn.* v. *U. S.,* 266 U. S. 17, 30, this Court pointed out that the division of joint rates, like the making of rates, is legislative in character and not a judicial function. In empowering the Commission to exercise its administrative functions with respect to the division of joint rates the Congress specifically mentioned a number of subjects to which "the Commission shall give due consideration, among other things." After the specific reference to these subjects this section of the statute (Section 15 (6)) directs consideration of "any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge." It will thus be seen that the Congress not only authorized but directed a broad inquiry in such cases, thereby permitting the Commission a wide choice of reasons upon which it might base its decision. It is also of great significance in this connection that the divisions prescribed under the statute must be not only just and reasonable (as in the case of rates) but also equitable. The use of the word *equitable* is peculiar to those sections of the Interstate Commerce Act relating to divisions. Although the word has not been judicially defined in this particular use,

it seems at least arguable that the Congress intended that there should be no hard and fast rules governing the determination of divisions and that each case involving divisions should be decided on its own facts in the exercise of a sense of fairness rather than by reliance on artificial formulae. It is further of interest to observe that this Court has pointed out that divisions cases may present questions of public interest that transcend "justice merely as between the parties." (See *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 477.)

As bearing on the significance of the word "equitable" as used in the provisions of the Interstate Commerce Act pertaining to divisions, it is worthy of note that prior to the enactment of those provisions the Commission had applied principles somewhat akin to those of equity jurisprudence in dealing with divisions under the former statute. In what was perhaps the first case dealing with divisions which it had occasion to decide, *Star Grain & Lumber Co.* v. *A., T. & S. F. Ry. Co.,* 14 I. C. C. 364, decided in 1908, the Commission said:

> The phrase "the just and reasonable proportion of such joint rate to be received by each carrier" necessarily implies that it is the duty of the Commission in fixing divisions to take into consideration all the circumstances, conditions, and equities that are necessary to arrive at what is a fair and

> proper adjustment of the situation as between the two roads, and precludes the idea that joint rates must be divided between the participating carriers on a mileage or any other fixed basis.

We submit that the foregoing statement may be accepted today as an accurate definition of the Commission's duty in fixing divisions under the existing statute. We shall now point out briefly some of the salient facts which influenced the Commission's decision in the instant case.

Although the Commission stated that the evidence descriptive of operating conditions was such that it did not support an estimate of the costs of handling this particular traffic in dollars and cents, the report mentions a number of facts which indicate that in many respects the transportation of citrus fruit is more burdensome to the southern than to the northern lines. It was pointed out that between the Florida gateways and Richmond the southern lines were unable to operate solid trains of citrus or other perishable freight. (R. 55–56.) On the other hand the Pennsylvania was shown to operate solid trainloads of perishable freight, including citrus fruit, between Potomac Yard and New York over the portion of its line principally used in this traffic. The Commission further found that the originating service performed by the southern lines was costly because of the wide distribution of production and variations from day to day in the amount of tonnage offered.

It was pointed out that the southern lines are required to perform a much longer haul of empty refrigerator cars for use in this traffic than the northern lines, and that reconsignment was a heavier burden on the southern lines than the northern. A study by the Seaboard Air Line showed an average cost of $4.24 per car for each diversion. (R. 55–56.) It was shown that in the shortening of schedules which took place in 1930 in order to provide better service demanded by shippers the southern lines absorbed 85 percent of the time reduction. (R. 57.) It was pointed out that the Pennsylvania receives citrus traffic in amounts ranging from 50 to 200 cars per day at Potomac Yard and that this carrier and the other northern lines conceded that large volume is ordinarily a favorable factor from the standpoint of economy.

As to general conditions it was shown that the general level of rates in the South was higher than in the North in recognition of higher operating costs in general, and the evidence of record justified this conclusion. It was shown that the southern lines require a greater margin of profit than the northern lines, as their volume and density of traffic is much less. In this connection it was pointed out that the traffic density of the Pennsylvania, the principal carrier of citrus fruit in the North, was 549 percent of that of the Atlantic Coast Line. (R. 63.)

Under the law the Commission was required to consider the financial condition of the carriers in-

volved, as this Court has stated, and it did not neglect this duty. It was shown that the industrial depression had affected the Florida lines with unusual severity. At the time of the decision the Florida East Coast and the Seaboard Air Line, which together originate 38 percent of the Florida citrus fruit, were in the hands of receivers. The Atlantic Coast Line had remained solvent, but its earnings had fallen off sharply during the depression. The Commission realized full well that its decision in this case would have a vital effect on the earnings of these three Florida lines because of the large percentage of their total traffic which consisted of citrus fruit. In the case of the Atlantic Coast Line it was pointed out that 13.6 percent of its total freight revenue came from citrus fruit, a greater percentage than it derived from any other category.. As to the Seaboard Air Line and the Florida East Coast the respective percentages of total revenue were 9 and 7.5, being exceeded only by percentages derived from petroleum products. In 1930 the Atlantic Coast Line had earned 2.4 percent on its investment, the Seaboard Air Line, 1.9 percent, and the Florida East Coast, 0.9 percent. On the other hand, the Pennsylvania in that year had a return of 3.6 percent and the Baltimore & Ohio, 4.2 percent. The following two years brought further declines. In 1932, which marked the nadir of the depression, the Seaboard Air Line's return on investment was 0.1 percent, that of the Atlantic

Coast Line was slightly less, and the Florida East Coast suffered a deficit. In the same year the Pennsylvania had a return of 1.9 percent and the Baltimore & Ohio, 2.2 percent. The Commission fulfilled its clear duty in giving some weight to this showing of differences in earning capacity.

The rates which the Commission was here called on to divide were those which it had itself prescribed some five years earlier. The rates represented reductions in the former rates, and these reductions were ordered largely in recognition of a showing of favorable conditions which affected the three Florida lines prior to 1926, principally reflecting the so-called Florida boom. It was therefore logical that in dividing the new rates the Commission threw the entire burden of the rate reductions on the Florida lines. But the Commission did not stop there. It fixed a basis of divisions which, as we have seen, afforded the northern lines about $2.15 more per car than they received from the old rates and divisions, amounting to about $62,000 per year in increased revenue. On brief appellants concede that this was, as it were, a step in the right direction, stating, however, that "the only trouble is that the Commission did not go far enough." Manifestly the conclusion of the Commission not to go farther than it did toward satisfying the demands of the northern lines was based on a thorough consideration of all the matters which it was legally required to take into account, as we

have undertaken to show. There is no warrant for any contention that the Commission acted arbitrarily or disregarded the facts of record.

Appellants charge that the Commission's action was arbitrary because it allegedly subordinated all the matters which it is required to consider to the element of the southern lines supposed financial need. Because the governing statute does not specify any one element or factor which shall be considered of paramount or predominant importance, appellants appear to be of the view that the Commission is precluded from basing its conclusions on some one factor instead of others. It is particularly charged that the Commission erred in giving such predominant effect to the alleged financial need of the Southern lines as to subordinate all other findings of fact thereto. Necessarily any judgment arrived at by the Commission in exercising its administrative functions necessitates giving more weight to certain elements than others in accordance with its appraisal of the facts of record in the particular case. The fact that the Congress did not see fit to specify any one consideration as paramount supports the power of the Commission to weigh the facts rather than restricts that power. It is well settled under the holdings of this Court that the question of the weight of evidence presented to the Commission is for the Commission and not for the courts, *Florida* v. *United States,* 292 U. S. 1, 12. Appellants' contention that the Commission

erroneously gave predominant weight to the element of financial need is merely an attempt to induce the Court to consider the weight of the evidence and hold that the Commission gave improper weight to such evidence.

In *New England Divisions case,* 261 U. S. 184, 189, the contention was made, similar to one made here (R. 129) that the order was void, because its purpose was not to establish divisions just, reasonable and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation. This Court pointed out (pp. 189–192) the fact that the Transportation Act, 1920, introduced into the federal legislation a new railroad policy, and stated that the provision concerning divisions was an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. In disposing of the contention advanced in the *New England Divisions case,* the court stated:

> * * * The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process. But the

> argument begs the question. What is its just share?—It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable, and equitable. Cost of the service is one of the elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom. (Id. 195.)

This statement is quoted only to indicate the broad power and duty of the Commission under the statutory provisions in question, because in the present case, while evidence as to the relative financial conditions of the carriers was received and given consideration, it was not, as a reading of the reports of the Commission will indicate, the only factor considered by the Commission nor was it given undue weight. In the *Beaumont case, supra,* this Court said:

> * * * The Commission must consider the financial condition of the carriers but it is not required to make that the only test. * * * (p. 87.)

This being the Commission's duty, evidence of relative financial conditions is always an important factor. If the fact were otherwise it would not be

beyond the Commission's authority. In the *Orient Divisions Case,* 265 U. S. 274, this Court said:

> It is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest "in order to maintain it in effective operation as part of an adequate transportation system", provided the share left to its connections is "adequate to avoid a confiscatory result." *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 477; *New England Divisions Case,* 261 U. S. 184, 194, 195. (Id. 284–285.)

The decision of the District Court (R. 260) constitutes a complete and effective answer to this contention.

(a) The Commission correctly applied the provisions of Section 15 (6) of the Act in giving consideration to the average rate of return from the total business of the Southern lines

It is alleged that the order is void and based upon a misconception of Section 15 (6) and in excess of the Commission's statutory powers because the Commission erroneously based its conclusions as to the financial needs of the southern lines, incident to the transportation of a single commodity, to wit, citrus fruit, upon the average rates of return from the *total business* of the southern lines. (R. 261.)

The theory of appellants appears to be that it was improper to consider the general financial condition

of the southern roads because of the Commission's statement in the original report to the effect that citrus fruit "was by far the most lucrative traffic which the Atlantic Coast Line had in this period, (1928–31) producing 13.6 percent of its total freight revenue." (R. 74.) This statement was contained in a paragraph discussing the importance of citrus traffic to the Florida railroads from the standpoint of gross revenue without any implication as to the profitability of the traffic from the standpoint of net revenue, as appellants would have us infer in their reiterations of the statement. In considering the financial condition of contending carriers in a divisions case, as it is required to do by law, it is manifestly pertinent for the Commission to take account of the relative importance of the traffic in comparison with other commodities. Nor has the Commission considered itself barred from considering general financial condition where the issues involved less than all the freight traffic of the interested carriers, *New England Divisions,* 66 I. C. C. 196; *Atchison, T. & S. F. Ry. Co.* v. *Baltimore & O. R. Co.,* 174 I. C. C. 321.

Appellants criticize the commission for considering rates of return of the contending parties on all their traffic and not limiting such consideration to "such property as is devoted or fairly attributable to the transportation of citrus fruit." Appellants admit, in making this contention, that "they seem

to be running counter to explicit expressions by the court on this point" (Original Brief, p. 150). There might perhaps have been some merit in such a criticism if the appellants had undertaken to inform the commission how the value of that portion of their property and that of the southern lines could be ascertained. They made no effort to develop such information nor indeed did they even suggest any arbitrary formula or method in substitution for such an ascertainment. Since their statistical evidence as well as that of their opponents dealt with general rates of return, the commission is not open to criticism for taking such evidence into account in its findings.

It appears somewhat inconsistent for appellants to criticize the Commission because, so it is claimed, it based its conclusions as to the financial needs of the southern lines, incident to the transportation of one commodity, citrus fruit, upon the average rates of return from the *total business* of the southern lines, while in this Court they seek to make out a group case of confiscation, on behalf of all appellants by using as the underlying basis, "system average" figures in computing the cost of carrying one commodity. Upon this point, the lower court said:

> Nor do we find that the Commission erroneously based its conclusion as to the financial need of the southern lines incident to the transportation of citrus fruit upon the average rate of return on all their property from

their total business. This contention depends largely on the calculations of the petitioners, made on the basis that we have found to be untenable, from which they conclude that the Commission's order gives to the southern lines abnormally large divisions far in excess of a fair return on their investment, while reducing the northern lines to a point at which nothing is left for such return. (R. 261.)

IV. A group allegation of confiscation cannot be maintained under the facts of this case

Whether an order of the Commission is confiscatory is a question of fact to be determined upon the special facts and circumstances of the party claiming such effect upon him. In *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, this Court held at page 228 that:

> * * * Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. * * *.

Since confiscation is a question of fact it follows that whether the order is confiscatory as to any one of the sixteen appellants in this case depends upon the facts submitted by that appellant which show the *effect* of the order upon *it*.

This was settled by the Court in *Minnesota Rate Cases,* 230 U. S. 352, in which the Northern Pacific, the Great Northern, and the Minneapolis and St. Louis railroad companies sued to enjoin rate orders and legislative rate acts of Minnesota prescribing maximum freight rates and passenger fares. Each of the railroads alleged confiscation and submitted testimony upon which it relied to establish that the rates were confiscatory. The State court confirmed the findings of the Master, holding that the prescribed rates were confiscatory as to *each* of the three railroads (pp. 380 and 437), and enjoined the order and legislative acts. This Court made separate findings with respect to each of the roads and held that, because the Northern Pacific and the Great Northern had used "general estimates" based upon gross revenues, to prove confiscation they had failed to sustain their claim (see pages 467 and 469), reversed the decrees below and remanded the case with direction to dismiss the bills of these two roads without prejudice (p. 473). But, in the same opinion, the court found from the evidence that the prescribed rates were confiscatory of the property of the Minneapolis and St. Louis Railroad and affirmed the decree of the State court so holding (p. 473). The difference in the action of the Supreme Court upon the decrees below was obviously due to the difference in the *effect* which it found that the prescribed rates had upon the individual properties of the three carriers, respectively.

Following its action in the case just discussed, the Court in *Missouri Rate Cases,* 230 U. S. 474, at pages 508–509 definitely rejected the contention that rates made by one act of the State Legislature could not be enforced against one company unless enforced against all, saying:

> The contention raised by the complainants, that these legislative acts cannot be enforced against one company unless enforced against all, cannot be sustained. The argument, in effect, is that although the charges of carriers may be clearly exorbitant, the State is powerless to compel them to put into effect reasonable rates because as to another carrier differently situated the rates thus prescribed might be unreasonably low. The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and *each* complainant in order to succeed in assailing them must show that *as to it* the rates are confiscatory. [Italics supplied.]

This Court's decision in *Aetna Insurance Co.* v. *Hyde, supra,* is decisive of the group confiscation contention of appellants.

CONCLUSION

The problem which the Commission faces in prescribing divisions is very much like that by which it is commonly confronted in establishing just and reasonable rates. There is no mathematical formula by which "just and reasonable" rates or

"just, reasonable and equitable" divisions can be determined. Concededly, the divisions must not be confiscatory. But when the allegation of confiscation is supported by resort to statistics reported to the Commission in accordance with its rules and published by it for public information, the applicability of those statistics to the question here presented should be considered in the light of the expressions of the Commission in the numerous cases which have involved the same fallacious theories here employed by appellants, as to the limitations necessarily attaching to such statistics in solving particular problems of service cost.

The decree of the District Court should be affirmed.

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APPENDIX

Excerpt from exhibit 43 of witness Doss introduced before Interstate Commerce Commission printed in this form pursuant to stipulation R. 299

Statement showing revenue per 100 pounds, per car and per car-mile accruing to lines east of East St. Louis and Chicago, Ill., on citrus fruits (other than lemons), c. l., from California producing territory to destinations in New England, eastern trunk line and Buffalo-Pittsburgh territories, under present rate of $1.55 per 100 pounds based on carload minimum weight of 36,000 pounds:

To	Gateway initial line	Destination line	Route	Miles	From East St. Louis			Miles	From Chicago		
					Revenue				Revenue		
					Per 100 lbs. (cents)	Per car	Per car-mile (cents)		Per 100 lbs. (cents)	Per car	Per car-mile (cents)
Buffalo, N. Y.	P. R. R.	P. R. R.	1	856	31.0	$111.60	13.04	673	25.58	$92.09	13.68
	B. & O.	B. R. & P.	16	941	31.0	111.60	11.86	764	25.58	92.09	12.05
	C. C. C. & St. L.	N. Y. C.	20	715	31.0	111.60	15.61				
	N. Y. C.	N. Y. C.	30					523	25.58	92.09	17.61
	Erie	Erie	45					610	25.58	92.09	15.11
	N. Y. C. & St. L.	N. Y. C. & St. L.	65	716	31.0	111.60	15.61	523	25.58	92.09	17.61
Pittsburgh, Pa.	P. R. R.	P. R. R.	1	616	31.0	$111.60	18.11	468	25.58	$92.09	19.68
	B. & O.	B. & O.	11	661	31.0	111.60	16.88	484	25.58	92.09	19.02
	C. C. C. & St. L.	P. & L. E.	28	690	31.0	111.60	16.17				
	N. Y. C.	P. & L. E.	38					480	25.58	92.09	19.18
	Erie	P. & L. E.	48					492	25.58	92.09	18.72

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